Supreme Court, U.S
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No. 04-412

In The
Supreme Court of the United States

GRETCHEN D. CUYLER, Special Administrator of the Estate of Christian Cuyler, deceased,

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Seventh Circuit

PETITION FOR A WRIT OF CERTIORARI

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QUESTION PRESENTED

Whether a federal court of appeal's failure to apply Illinois procedure in rendering a decision reversing the district court was contrary to the Rules of Decision Act and this Court's precedents?

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PETITION FOR A WRIT OF CERTIORARI

Petitioner, Gretchen D. Cuyler, in her representative capacity as Special Administrator of the Estate of her son, Christian Cuyler, respectfully petitions for a Writ of Certiorari to review the judgment of the United States Court of Appeals for the Seventh Circuit in this case.

OPINIONS BELOW

The Opinion of the Court of Appeals on direct appeal is reported as *Cuyler v. United States*, 362 F.3d 949 (7th Cir. 2004); it is reprinted as Appendix A1. The Order of the Court of Appeals entered on June 23, 2004, denying a petition for rehearing and petition for rehearing *en banc*; it is reported at App. 1. An Opinion of the District Court for the Northern District of Illinois is reported as *Cuyler v. United States*, 37 F.Supp.2d 1099 (N.D.Ill. 1999); it is reprinted at App. 13. An unpublished Memorandum and Order of the District Court for the Northern District of Illinois entered on March 4, 2003, is reprinted at App. 25.

JURISDICTION

The judgment of the Court of Appeals was entered on March 30, 2004. A petition for rehearing and petition for rehearing with suggestions for rehearing *en banc* was timely filed and denied on June 23, 2004. This Petition is timely filed pursuant to Supreme Court Rule 13.1, in that it is filed within ninety (90) days of the entry of judgment by the United States Court of Appeals for the Seventh

Circuit. The jurisdiction of this court is invoked pursuant to 28 U.S.C. §1254(1).

STATUTES INVOLVED

The Rules of Decision Act, 28 U.S.C. §1652, provides, in pertinent part:

> The laws of the several states . . . shall be regarded as rules of decision in civil actions in the courts of the United States, in cases where they apply.

Illinois' Abused and Neglected Children Reporting Act (ANCRA), 325 I.L.C.S. §5/1, *et seq.* provides, in pertinent part:

> §2. The Illinois Department of Children and Family Services shall, upon receiving reports made under this Act, protect the health, safety, and best interests of the child in all situations in which the child is vulnerable to child abuse or neglect, offer protective services in order to prevent any further harm to the child and to other children it the same environment or family . . . whenever possible.
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> * * *
>
> §4. Persons required to report . . . Any physician, resident, intern, hospital, hospital administrator and personnel engaged in examination, care and treatment of person . . . having reasonable cause to believe a child known to them in their professional or official capacity may be an abused child or a neglected child shall immediately report or cause a report to be made to the Department.

> . . . In addition to the above persons required to report suspected cases of abused or neglected children, any other person may make a report if such person has reasonable cause to believe a child may be an abused child or a neglected child.
>
> * * *
>
> §9. Any person . . . participating in good faith in the making of a report . . . shall have immunity from any liability, civil, criminal or that otherwise might result by reason of such actions. For the purpose of any proceedings, civil or criminal, the good faith of any persons required to report or refer, or permitted to report, cases of suspected child abuse or neglect . . . shall be presumed.

STATEMENT OF THE CASE

This is a wrongful death case brought by Gretchen D. Cuyler, the mother of Christian Cuyler, a seventeen month old child who died of injuries inflicted by his babysitter, Edwina Higgs. The suit was brought against the United States under the Federal Tort Claims Act and alleged that the Navy had breached its duty under the mandatory reporting requirement of Illinois law, specifically section 4 of the Abused and Neglected Child Reporting Act (ANCRA), 325 I.L.C.S. §5/1, *et seq.*, for failing to report Higgs' abuse of another child, Antonious Norman, twenty-eight days earlier when that child was examined by medical personnel at the Great Lakes Naval Hospital and found to have been abused. The District Court for the Northern District of Illinois had jurisdiction pursuant to 28 U.S.C. §1346(b).

The government moved to dismiss the complaint for failing to state a claim under Illinois law. Noting that at that time "no Illinois court has expressly addressed whether . . . there is a private cause of action based on a failure to report suspected child abuse," the district court set out to determine whether Illinois would recognize a claim for negligence under the circumstances presented. *Cuyler v. United States*, 37 F.Supp.2d 1099, 1102-03 (N.D.Ill. 1999); App. 19. Utilizing the same approach authorized by several cited Illinois decisions, as well as a decision of the Seventh Circuit in *Enis v. Ba-Call Building Co.*, 639 F.2d 359 (7th Cir. 1980), the district court denied the motion holding that the complaint stated "a claim for negligence based on a violation of an Illinois public safety statute," ANCRA, 37 F.Supp.2d at 1104; App 24.

A second district judge conducted a trial on the issues of proximate cause and damages. The abuse by Higgs of both the Norman and Cuyler infants and the subsequent injuries and death of Christian Cuyler were stipulated. The district court found "by a preponderance of the evidence that it is reasonably certain that the Navy's failure to report the abuse of the Norman child was a proximate cause of the abuse and death" of Christian Cuyler. Order of March 4, 2003; App. 42.

An appeal was taken to the Seventh Circuit Court of Appeals by the government. The thrust of its argument was that absent express language in a state's public safety statute setting out a private cause of action for violations of its terms, there must be a pre-existing common law duty to support any claim for negligence. As there was no generally recognized duty at common law to protect one from the criminal acts of another or to come to the aid of a

person in distress, there can be no cause of action under ANCRA.

A panel of the Seventh Circuit accepted the notion of a common law nexus and reversed the judgment of the district court. *Cuyler v. United States*, 362 F.3d 949 (7th Cir. 2004; App. 1. Contrary to Illinois procedure, the panel announced that "only if the Illinois common law of torts imposed on the medical personnel of the Great Lakes Naval Hospital a duty of care to the Cuyler's child would the Illinois notification statute specify the level of care that they owed the child." 362 F.3d at 952; App. 5. Though the Seventh Circuit noted the Illinois approach in passing, it failed to apply Illinois' caselaw pertaining to public safety legislation as did the district judge choosing instead to adopt reasoning from other jurisdictions, specifically Texas and New Hampshire, without analyzing the differences between their statutes and ANCRA.[1] 362 F.3d at 954-55; App. 9. The jurisdiction of the United States Court of Appeals was pursuant to 28 U.S.C. §1291.

The petitioner's answering Brief in the Court of Appeals elaborated on Illinois' rich history of upholding similar legislation once it was determined to qualify as a public safety legislation. In addition to discussing the caselaw relied upon by the district judge, petitioner placed its reliance prominently upon an Illinois appellate court opinion upholding a suit sounding in negligence and

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[1] For instance, Texas law required everyone to report suspected child abuse while ANCRA does not; ANCRA specifies by occupation mandatory reports only from those "having reasonable cause to believe a child known to them in their professional or official capacity may be an abused child or a neglected child." Compare, ANCRA, §4 with *Perry v. S.N.*, 973 S.W.2d 301, 307 n.6 (Tex.1998).

premised upon the violation of ANCRA's mandatory reporting requirement. The decision, *Doe v. Dimovski*, 336 Ill.App.3d 292, 294-95, 783 N.E.2d 193, 196 (Ill.App.), *appeal denied*, 204 Ill.2d 658, 792 N.E.2d 306 (2003), received little treatment in the decision of the Seventh Circuit. Nonetheless, in the conclusion section to its opening Brief, the government averted to the possibility of certifying the question "[i]f the Court is not convinced that the Illinois Supreme Court would have caused this case to be dismissed." Believing that the wealth of representative Illinois caselaw along with the recent finding of a cause of action by an intermediate Illinois court would be followed by the Seventh Circuit, and armed with a well-reasoned opinion from the district court, the petitioner rejected this suggestion.

A petition for rehearing and petition for rehearing with suggestions for rehearing *en banc* was prepared seeking to convince the Seventh Circuit that its resort to the laws of other states and their procedural approach was in contravention of the principles flowing from *Erie Railroad Co. v. Tompkins*, 304 U.S. 64 (1938), and its progeny. Alternatively, the petitioner offered her entreaty to the panel requesting certification of this question to the Illinois Supreme Court referencing this Court's opinion in *Lehman Bros. v. Schein*, 416 U.S. 386 (1974) and the decision in *State Farm Mutual v. Pate*, 275 F.3d 666, 669, 672 (7th Cir. 2001).

REASONS FOR GRANTING THE WRIT

The Seventh Circuit's failure to apply Illinois procedure as did the district court in favor of decisions of other jurisdictions was directly contrary to the practices established by this Court.

a. The Standard of Review of the Federal Court.

Whenever a federal court is called upon to decide an issue utilizing state law, as here, the Rules of Decision Act, 28 U.S.C. §1652, at least since the decision in *Erie Railroad Co. v. Tompkins*, 304 U.S. 64, 58 S.Ct. 817 (1938), requires the federal court to ascertain the relevant state law and to follow its dictates. This rule is the standard for review of the decision of a federal court attempting to decide an issue of state law; the petitioner respectfully submits that Illinois law was not followed here.

Erie Railroad Co. v. Tompkins, supra, 304 U.S. at 71, 74, was decided due to the "mischievous results" experienced when it was believed that a federal court "need not, in matters of general jurisprudence, apply the unwritten law of the state as declared by its highest court [and] that they are free to exercise an independent judgment as to what the common law of the state is – or should be." One of the main problems resulting from this approach was that the "[p]ersistence of state courts in their own opinions on questions of common law prevented uniformity" of decisions. Id. Thus, while "attempting to promote uniformity of law throughout the United States, the doctrine had prevented uniformity in the administration of the law of the [individual] state." 304 U.S. at 75.

This unsatisfactory state of affairs was pegged to the erroneous "assumption that there is a transcendental body

of law outside of any particular State." *Erie Railroad Co. v. Tompkins*, supra, 304 U.S. at 79. This conclusion caused the Supreme Court to note that there was "no federal general common law." Id. at 78. Reiterating a position long espoused by Mr. Justice Holmes, the Court declared that the "common law so far as it is enforced in a State, whether called common law or not, is not the common law generally but the law of that state existing by authority of that State without regard to what it may have been in England or anywhere else." Id. See also, *Houben v. Telular Corp.*, 309 F.3d 1028 (7th Cir. 2002).

b. The proper approach under Illinois law.

For purposes of determining whether Illinois' Abused and Neglected Children Reporting Act (ANCRA), 325 I.L.C.S. §5/1, *et seq.*, was intended by its lawmakers to subject required reporters to tort liability based solely on a failure to report a suspected case of child abuse, it is necessary to briefly describe the legislative scheme and its avowed purpose. The first four substantive sections of ANCRA describe its purpose and application, relevant definitions and a comprehensive set of paragraphs describing when and by whom mandatory reports to the Department of Children and Family Services (DCFS) are required.

In summary fashion, the first provision describes in the broadest language the Illinois' legislators' intent to "protect the health, safety and best interests of the child in all situations in which the child is vulnerable to child abuse and neglect, [and to] offer protective services in order to prevent any further harm to the child and to other children it the same environment or family." ANCRA, §2.

The definitions section includes *inter alia* the same language describing an "abused child" as is found in Illinois' Juvenile Court Act, 705 ILCS 405/2-3(2). The centerpiece of the legislation is an all-encompassing description of those who are required to report suspected abuse of "a child known to them in their professional or official capacity." ANCRA, §4. The first paragraph of this section lists those required to report by job description, beginning with physicians and ending with a catchall phrase, to wit, "or any other foster parent, homemaker or child care worker;" but the standard for filing an immediate report which follows limits this requirement to trained persons only "[who] having reasonable cause to believe a child known to them in their professional or official capacity may be an abused child or a neglected child." Id.[2] Additionally, ANCRA provides criminal and disciplinary sanctions for willful violations. ANCRA, §4.02.

The next several sections describe the actions which DCFS is obligated to take which include "immediately" reporting to a central registry "initial, preliminary and final" reports of suspected child abuse as well as notifying local law enforcement and the county state's attorney "within 24 hours." ANCRA, §§7, 7.7.

The final section of ANCRA to be discussed herein is entitled "Immunity from Liability," and provides broad immunity to any person who reports a case of suspected child abuse in good faith for both civil and criminal liability. ANCRA, §9. As noted in the opinion of the Seventh

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[2] While the panel voiced concern over the breadth of this language for its inclusion of "homemaker," this language is directly modified by the phrase "in their professional or official capacity." *Cuyler v. United States*, 362 F.3d 949, 955 (7th Cir. 2004); App. 10.

Circuit, however, ANCRA does not contain explicit language expressly "specify[ing] any purely civil sanctions, such as damages or injunctive relief." See, *Cuyler v. United States*, supra, 362 F.3d at 951; App. 3. There were no examples of other Illinois legislation cited which contains such language.

Illinois courts honor the intent of its legislators when interpreting the reach of a comprehensive statutory scheme. The "cardinal rule . . . is to ascertain and give effect to the true intent and meaning of the legislature. . . . [Where] the language of a statutory provision is clear, the court must give it effect without resorting to other aids for statutory construction." *Solich v. Portes Cancer Prevention Center of Chicago*, 158 Ill.2d 76, 81, 630 N.E.2d 820 (1994). Accord, *In Re D.D.*, 196 Ill.2d 405, 418-19, 752 N.E.2d 1112 (2001).

As aforesaid, the intent of the legislature in the passage of ANCRA, a form of a mandatory reporting act much more comprehensive than those of some other states, may be readily gleaned from its avowed purposes which it sets out in no uncertain terms. ANCRA requires mandatory reports by those most likely to come into contact with abused or neglected children who are specially trained to recognize such abuse. In so providing, the legislature is enforcing its purpose to "protect the health, safety, and best interests of the child in all situations in which the child is vulnerable to child abuse or neglect, offer protective services in order to prevent any further harm to the child *and to other children in the same environment* or family . . . whenever possible." ANCRA, §2 (emphasis added).

ANCRA represents a recognition that the State is the "ultimate protector of the rights of minors" but also that it cannot do so effectively without a mandatory reporting system. *Lehman v. Stephens*, 148 Ill.App.3d 538, 547-48, 499 N.E.2d 103 (Ill.App. 1986). The district judge determined that the statutory language of Illinois' mandatory child reporting statute had been previously adjudicated in such a manner as to qualify as a public safety statute. *Cuyler v. United States*, 37 F.Supp.2d 1099, 1103 (N.D.Il. 1999) (citing, *Pesce v. J. Sterling Morton High School*, 830 F.2d 789, 798 (7th Cir. 1987)); App. 21. Id. Finding that the Illinois statute contained "the express intention of the Illinois legislature to prevent harm to other children in the same environment as abused children," the Court addressed Illinois' decisional caselaw which discuss suits based duties which emanate from public safety legislation. Id. at 1104.

Rather than applying Illinois jurisprudence to determine whether the Illinois Supreme Court may hold that a civil claim could be premised upon the mandatory provisions of ANCRA, the panel resorted to the federal approach. Cf. *Cuyler v. United States*, 362 F.3d at 954; App. 8-9. Under such cases as *Cort v. Ash*, 422 U.S. 66, 78 (1975), once a federal court concludes that the plain language does not explicitly provide for a private cause of action, it examines other factors for "any indication of legislative intent, explicit or implicit." See also, *Karahalios v. Federal Employee*, 489 U.S. 527, 532-33 (1989).

The Illinois Supreme Court acknowledges that it employs "an entirely different approach" from that utilized in federal courts. *Noyola v. Board of Education*, 179 Ill.2d 121, 129, 688 N.E.2d 81, 84 (1997) (citing, Restatement (Second) of Torts §§286, 288B (1965); Restatement (Second) of Torts

§874A (1979)). The learned district judge demonstrated his awareness that in Illinois a "violation of a statute or ordinance designed to protect human life or property" is evidence of negligence. Cf. *Cuyler v. United States*, 37 F.Supp.2d 1099, 1103-04 (N.D.Ill. 1999); App. 20.While New Hampshire also requires an "express or implied legislative intent to create such civil liability," similar to the federal practice, Illinois does not. *Marquay v. Eno*, 139 N.H. 708, 715, 662 A.2d 272 (1995); but see, *Rodgers v. St. Mary's Hospital*, 149 Ill.2d 302, 308, 597 N.E.2d 616 (1992); *Sawyer Realty Group, Inc. v. Jarvis Corp.*, 89 Ill.2d 379, 386-87, 432 N.E.2d 849 (1982). But cf. *Cuyler v. United States*, 362 F.3d at 954; App. 9. Thus, Illinois courts will find a private cause of action if the public interest test is met regardless of the presence of any statement indicating legislative intent which may be fatal under the federal approach.

This is so because under Illinois caselaw the courts will endeavor to determine whether a public safety measure provides an implied private cause of action by resorting to a longstanding approach recognized by various treatises as one of several methods by which courts determine legislative intent. "Implied private rights of action are an established feature of [Illinois] jurisprudence." *Noyola v. Board of Education*, supra, 179 Ill.2d at 128. Chief among these statutory efforts to impose legal duties not known at the common law are the so-called public interests statutes. "Where a defendant violates one of these statutes or ordinances, a plaintiff who belongs to the class intended to be protected by the statute or ordinance and whose injury is of the type the statute or ordinance was intended to protect against may recover upon establishing that the defendant's violation proximately caused

plaintiff's injury. (cases cited)." *Noyola v. Board of Education*, supra, 179 Ill.2d at 130. This was the precise finding made in the district court. *Cuyler v. United States*, 37 F.Supp.2d at 1104; App. 22-23.

As shown in the many cases cited in the Opinion of the district judge below, Illinois courts have long employed this method to provide *prima facie* evidence of negligence. E.G., *Kalata v. Anheiser-Busch Companies, Inc.*, 144 Ill.2d 425, 434-35, 581 N.E.2d 656 (1991). If unclear, the court may "consider the purpose behind the law and the evils the law was designed to remedy." *Solich v. Portes Cancer Prevention Center of Chicago*, supra, 158 Ill.2d at 81. Construing a statutory right is appropriate when "(1) the plaintiff is a member of the class for whose benefit the statute was enacted; (2) the plaintiff's injury is one the statute was designed to prevent; (3) a private right of action consistent with the underlying purpose of the statute; and (4) implying a private right of action is necessary to provide an adequate remedy for violations of the statute. (citations omitted)." *Fisher v. Lexington Healthcare Inc.*, 188 Ill.2d 455, 460, 722 N.E.2d 1115 (1999).

Illinois courts have consistently held that ANCRA expresses a two-fold public policy "to protect (1) any abused child and (2) any person erroneously accused of abuse." *Kemp-Golden v. Department of Children and Family Services, Inc.*, 281 Ill.App.3d 869, 874, 667 N.E.2d 688 (Ill.App. 1996). As a result, through its reporting requirements of the Act "contemplates two categories of 'subjects' of a report, one category being the alleged perpetrator of abuse or neglect and the other category being 'the child subject.'" Id. at 874-75. ANCRA fits comfortably into

the category of public interest legislation. Its rigid reporting requirement and all-encompassing immunity provision are designed to protect children by mandating reports of suspected child abuse for "professional or official" persons most likely to come into contact with abused and neglected children. ANCRA, §4. "Doctors are considered the professionals most likely to see injured children, and they are presumed most qualified to diagnose the symptoms of abuse and neglect." Besharov, *The Legal Aspects of Reporting Known and Suspected Child Abuse and Neglect*, 23 Villanova Law Review 458, 466-67 (1978).

ANCRA also focuses official attention upon those reported to be suspected abusers in an effort "to prevent any further harm to the child *and to other children* in the same environment," just as Christian Cuyler was in Higgs' environment located near the naval base to provide child care services resulting in two known victims, the Norman and Cuyler children. ANCRA, §2. Thus, under ANCRA, the duty to report Higgs' suspected child abuse was actionable even though she "was not the patient," as identifying potential perpetrators was also a focus of the legislation. But see, *Cuyler v. United States*, supra, 362 F.3d at 954; App. 8.

After the decision in the district court, an Illinois appellate court in *Doe v. Dimovski*, 336 Ill.App.3d 292, 294-95, 783 N.E.2d 193, 196 (Ill.App.), *appeal denied*, 204 Ill.2d 658, 792 N.E.2d 306 (2003), reviewed a complaint alleging that a student had been abused by the same teacher who had earlier abused another student and that this student's parent complained to the school officials who did not make the required report in violation of ANCRA. The trial court denied the motion to dismiss the complaint upholding the plaintiff's causes of action for negligence for

the school officials' failure to report suspected abuse but accepted school officials' claims of governmental tort immunity. The appellate court reversed this bar to prosecuting the plaintiff's private cause of action holding that any discretion afforded school officials by the more general governmental tort immunity provisions was removed by ANCRA: "[i]f school personnel were allowed to determine whether reasonable cause existed or whether such abuse actually occurred before reporting the matter to DCFS, the goal of protecting children from sexual abuse would be undermined." Id. at 297; accord, *Williams v. Coleman*, 194 Mich.App. 606, 610-11, 488 N.W.2d 464, 466-67 (Mich.App. 1992).

Additionally, the appellate court considered the Board's argument as if on cross-appeal to determine whether the trial court should have granted their motion to dismiss for the complaint's failure to state a cause of action. The appellate court found that there was a cause of action for negligence for the failure to report the suspected child abuse. It based its findings on facts directly comparable to those which led to the death of young Christian Cuyler. "[P]laintiff's claim for negligence is based on the prior inappropriate conduct of Dimovski, which was known or should have been known by the Board . . . and the Board's subsequent failure to report the inappropriate conduct, making it reasonably foreseeable that such conduct would recur." *Doe v. Dimovski*, supra, 336 Ill.App.3d at 298-99.

Nevertheless, the Seventh Circuit dismissed this holding without discussion noting that "[n]o Illinois case has addressed the question whether [ANCRA] implicitly creates a private right to obtain damages." *Cuyler v. United States*, supra, 362 F.3d at 954; App. 9. The

Dimovski Court directly addressed its concern, however, that the duty did not flow to the abuse suffered by a second child:

> Initially, we note that the Board appears to argue that the injury was not foreseeable. Here, plaintiff has alleged sufficient facts to show that plaintiff's injury was reasonably foreseeable. The Board's alleged knowledge of the alleged prior instances of sexual abuse by Dimovski with another female high school student made his similar behavior with plaintiff reasonably foreseeable. The danger to female students in general was reasonably foreseeable given Dimovski's history of alleged sexual misconduct. Put another way, absent the Board's alleged nonfeasance, the injury sustained by plaintiff likely would not have occurred.

Doe v. Dimovski, supra, 336 Ill.App.3d at 299. Compare, *Enis v. Ba-Call Building*, 639 F.2d 359, 361-62 (7th Cir. 1980), with *Cuyler v. United States*, supra, 362 F.3d at 953-54; App. 6-7.

The various findings of the appellate court concerning the statutory standard established by ANCRA's mandatory reporting requirement and the unavailability of tort immunity allowed the *Dimovski* case to proceed to trial. Thus, the holding is directly controlling of the determination of the duty of the naval medical staff to report Higgs' abusive behavior and, upon a factual finding of proximate causation, to provide compensation for this decedent's injuries for the medical staff's negligent failure to report. See, e.g., *Davis v. Marathon Oil Co.*, 64 Ill.2d 380, 390, 356 N.E.2d 93 (1976); *Ney v. Yellow Cab. Co.*, 2 Ill.2d 74, 79, 117 N.E.2d 74 (1954). In Illinois, the issue of proximate cause is for the factfinder. *Kalata v. Anheiser-Busch Companies, Inc.*, supra, 144 Ill.2d at 437-38; Cf. Illinois

Pattern Jury Instructions, IPI Civil 3rd, Nos. 12.04 and 15.01.

Similarly, in *Calloway v. Kinkelaar*, 168 Ill.2d 312, 319-20, 327, 659 N.E.2d 1322 (1995), the Illinois Supreme Court looked to the statement of the Domestic Violence Act's purpose, and also its immunity provision, to determine whether a private cause of action was consistent with its remedial nature. Utilizing the precise analysis employed by the court in *Williams v. Coleman*, supra, the Court pointed out that law enforcement officers are to use all reasonable means to prevent further abuse. Id. at 321-22. While said officers were to receive immunity for the "good-faith performance of their duties under the Act," the immunity was limited and found to allow a civil cause of action if a plaintiff could establish actual misconduct. Id. at 322-23. In accepting the plain language of the immunity provision, the Illinois Supreme Court refused to engraft onto the Act the general principles of governmental tort immunity usually found to be applicable. In this regard, the court expressed that it was giving "judicial recognition" to the legislative purpose of the Act just as did the appellate court in *Doe v. Dimovski*, supra. Id. at 324.

The entire thrust of ANCRA is to prevent child abuse by identifying potential child abusers. In *Lehman v. Stephens*, supra, 148 Ill.App.3d at 547-48, the court rejected a constitutional challenge to the widespread powers bestowed by ANCRA because of the clear legislative intent to address the "potentially devastating consequences of continued, undetected child abuse, as well as the inherent difficulty in uncovering such cases." Id. Whether the failure to report results in subsequent injury to the same child or "to other children in the same environment or family" matters not as it is the intent of this

legislation to punish the breach of the duty to report which is the basis for tort liability subject to a proximate cause determination. ANCRA, §2. Given the similarity of the statutory purposes and content, Illinois' highest court should also find a private cause of action as it did in *Calloway v. Kinkelaar*, supra, when it eventually addresses the same issue under ANCRA.

The precise reason why the Seventh Circuit believed it necessary to resort to a common law analysis when the Illinois Supreme Court has never done so in similar circumstances is not known. ANCRA, like Illinois' Juvenile Court Act and its Domestic Violence Act, represents "a comprehensive statutory scheme which creates rights and duties that have no counterparts in common law or equity." *In Re D.D.*, supra, 196 Ill.2d at 416. The plaintiff's argument on appeal mirrored that found in the Opinion of the district court that both the "express intention" of ANCRA's lawmakers and also Illinois' "public safety" doctrine supplied the duty not available at common law. *Cuyler v. United States*, supra, 37 F.Supp.2d at 1104; App. 23-24.

Though the Seventh Circuit has always in the past accorded "substantial deference" to a district judge's interpretation of law recognizing that any federal court may make an "incorrect prediction" on an undecided question of state law, it is a great puzzle as to its decision not to follow the well-reasoned approach of the district court. *Collins Company, Ltd. v. Carboline Co.*, 837 F.2d 299, 301 (7th Cir. 1988). In such an instance, a federal court is constrained to follow analogous decisions of the state appellate courts for guidance as the "best indication of how the Illinois Supreme Court would decide" the case. *Malone v. Bankhead Enterprises, Inc.*, 125 F.3d 535, 539

(7th Cir. 1997) (citing *West v. AT & T*, 311 U.S. 223, 236-37 (1940)). It is only when a state's intermediate courts are in conflict on an issue of law that a federal court may apply the law as it sees it rather than the law of the state. *Liberty Mutual Fire Ins. Co. v. Statewide Ins. Co.*, 352 F.3d 1098, 1100 (7th Cir. 2003). When there is no conflict among the appellate courts, the federal court is bound to follow their lead. *Allstate Insurance Co. v. Menard's Inc.*, 285 F.3d 630 (7th Cir. 2002). "Any other ruling would do violence to the principle of uniformity within a state." Id. at 636 (citing *Klaxon v. Stentor Manufacturing Co.*, 313 U.S. 487, 496-97 (1941)).

Unlike *Parra v. Tarasco*, 230 Ill.App.3d 819, 823, 825 595 N.E.2d 1186 (Ill.App. 1992), erroneously relied upon by the panel of the Seventh Circuit, where the "underlying purpose of the statute" was to "encourage[] voluntary aid" to those choking, the duties relied upon for the negligence action below were mandatory requirements. There can be no comparison between the lack of a legal duty for failing to provide a permissive though encouraged benefit upon another and the duties flowing to the petitioner's son. As the district court correctly found, "[h]ere the decedent easily falls within the intended beneficiaries of [ANCRA]." Compare, *Cuyler v. United States*, supra, 37 F.Supp.2d at 1104 (App. 22), with *Cuyler v. United States*, supra, 362 F.3d at 953 (App. 7) ("For here, as in the indistinguishable case of *Parra v. Tarasco*, [supra], there was no duty."). The district court relied directly upon the statute for the conclusion that ANCRA was enacted to:

> offer protective services in order to prevent any further harm to the child and to other children in the same environment or family . . . and protect the health and safety of children in all situations

> in which they are vulnerable to child abuse or neglect.

Cuyler v. United States, supra, 37 F.Supp.2d at 1104; App. 23.

Since *Doe v. Dimovski*, supra, yet another division of the Illinois appellate court has rendered a decision determining whether ANCRA allows for a private cause of action for failures to follow its mandatory requirements. The court in *Doe v. North Central Behavioral Health Systems, Inc.*, ___ Ill.App.3d ___ (August 26, 2004), employed the precise legal analysis advanced by the petitioner below and employed herein by the district court but with the opposite result. See, App. 46. Demonstrating that the analysis employed by the district court was the correct approach to determine Illinois law, this most recent decision also found that the plaintiffs belonged to the class of persons intended to be protected and that their injuries were of the type the statute was enacted to protect against. The reason for the contrary results is owing to a disagreement on the fourth requirement established by Illinois precedent. Adopting a restrictive approach not shown to have been shared by the framers of ANCRA, the latter state reviewing court opined that a cause of action is not necessary to provide an adequate remedy given the provision allowing criminal prosecutions for willful violations.

The decision of the Seventh Circuit Court of Appeals below and the recent decision in *Doe v. North Central Behavioral Health Systems, Inc.*, supra, have only one thing in common: both attempt to distinguish the decision in *Doe v. Dimovski*, supra. The opinion of the Seventh Circuit has now been shown by a second case directly on point to have utilized the wrong procedural approach to

reverse the decision of the district court. Though the district judge's conclusion differed with the recent opinion of the Illinois appellate court, it followed the exact same analysis to determine whether ANCRA provided a private cause of action as did the Illinois court in *Doe v. North Central Behavioral Health Systems, Inc.*, supra. The Seventh Circuit was equally obligated to adhere to the Illinois procedure for determining whether a public safety statute provided for an implied private cause of action. *Erie Railroad Co. v. Tompkins*, supra.

It may now be said that there is presently a conflict between different divisions of Illinois' appellate courts which did not exist at the time of any of the federal decisions below. When the Seventh Circuit determined that it would not follow *Doe v. Dimovski*, supra, or affirm the decision of the district court, it overstepped its traditional role and invited the very situation federal courts are advised to avoid – setting new ground in areas in which the state's appellate and supreme courts have not spoken definitively so as not to risk doing "violence to the principle of uniformity within a state." *Klaxon v. Stentor Manufacturing Co.*, 313 U.S. 487, 496 (1941). "That object would be thwarted if the federal courts were free to choose their own rules of decision whenever the highest court of the state has not spoken." *West v. AT & T*, supra, 311 U.S. at 236.

The fact that there is now an obvious disagreement within the Illinois appellate courts makes it more likely that the four plaintiffs in *Doe v. North Central Behavioral Health Systems, Inc.*, supra, will be granted leave to appeal by the Illinois Supreme Court and only serves to highlight the need to certify this "outcome determinative" question to the Illinois Supreme Court. *State Farm Mutual Automobile Insurance Co. v. Pate*, 275 F.3d 666, 672

(7th Cir. 2001). Even if it is shown in the months to come that the Seventh Circuit came to the right conclusion, it will have done so for the wrong reasons and its opinion below will remain precedential only as representative of a conflict between this decision and its earlier holding in *Enis v. Ba-Call Building Co.*, 639 F.2d 359 (7th Cir. 1980), upon which the district court relied. After all, the decisions of the Seventh Circuit Court of Appeals have "no precedential effect on the state courts. (cases cited)." *Todd v. Societe Bic, S.A.*, 21 F.3d 1402, 1416-17 (7th Cir. 1994) (*en banc*) (Ripple, J., dissenting). There is generally seen, however, that when the "federal court's '*Erie* Guess' is wrong, the resulting impact on state law developments is . . . especially significant." Id.

Though the proper role of the Seventh Circuit was to enforce the law of the forum state, the decision below violated this traditional role of federal courts which emanated from the decision of *Erie Railroad Co. v. Tompkins*, supra. As requested below, fairness dictates the judgment below be certified to the Illinois Supreme Court in order to resolve the conflict between *Doe v. North Central Behavioral Health Systems, Inc.*, supra, and *Doe v. Dimovski*, supra, and each of those cases with the decision of the Seventh Circuit. "Certification is an alternative to prognostication. See, *Lehman Bros. v. Schein*, 416 U.S. 386, 390-91 (1974)." *Todd v. Societe Bic, S.A.*, 9 F.3d 1216, 1222 (7th Cir. 1993) (*en banc*).

As was this Court's wise counsel to remand the Petition filed in *Lehman Bros. v. Schein*, supra, here too it would be most appropriate where there is doubt as to how the Illinois Supreme Court will determine the conflict between its appellate courts which now exists, but which did not at the time of the opinion below. It is only by doing

so that there can ever be any assurances that the opinion below reversing the decision of the district court was decided rightly; failure to do so will likely result in a great uncertainty for future litigants attempting to exercise their perceived rights under the many public safety statutes enacted in Illinois and elsewhere regardless of how this issue is ultimately decided by the Illinois Supreme Court.

CONCLUSION

For the reasons noted herein, the Petitioner respectfully prays that a Writ of Certiorari issue to review the judgment and opinion of the United States Court of Appeals for the Seventh Circuit or, alternatively, that the case be remanded for certification of the issue to the Illinois Supreme Court pursuant to Circuit Rule 52, Circuit Rules of the United States Court of Appeals for the Seventh Circuit.

Respectfully submitted,

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362 F.3d 949

United States Court of Appeals,
Seventh Circuit.

Gretchen D. **CUYLER**, Special Administrator of the Estate of **Christian Cuyler**, deceased, Plaintiff-Appellee,

v.

UNITED STATES of America, Defendant-Appellant.

No. 03-2298.

Argued Feb. 26, 2004.
Decided March 30, 2004.

William L. Suhadolnik (argued), Waukegan, IL, for Plaintiff-Appellee.

William G. Cole (argued), Department of Justice Civil Division, Appellate Section, Washington, DC, Jack Donatelli, Office of the United States Attorney, Chicago, IL, for Defendant-Appellant.

Before BAUER, POSNER, and KANNE, Circuit Judges.

POSNER, Circuit Judge.

This is a suit for wrongful death brought against the United States under the Federal Tort Claims Act, which, with limitations that we can ignore, makes the federal government liable for the torts of its employees to the same extent that they would be liable under the law of the place where the tort was committed, in this case Illinois. A trial in the district court resulted in a judgment for the plaintiff for $4 million, from which the government appeals.

In August of 1994, a woman named Higgs, babysitting for the family of a Navy enlisted man named Norman who was stationed at the Great Lakes Naval Base near Chicago, abused Norman's 14-month-old son. The abuse resulted in injuries that required the child's hospitalization at Great Lakes Naval Hospital, a federal facility. The medical personnel at the hospital, who are federal employees, failed to report the incident to the Illinois Department of Children and Family Services, as required by the state's Abused and Neglected Child Reporting Act (ANCRA), 325 ILCS 5/1 *et seq.* That it is a federal hospital that may or may not be subject to ANCRA is irrelevant to the government's liability under the tort claims act, for reasons explained in *Carter v. United States,* 333 F.3d 791, 795 (7th Cir.2003).

Higgs said that the child's injuries had been caused by his falling down "the steps," presumably accidentally, but the medical personnel should have realized that the child was a victim of abuse rather than of accident. Indeed, they seem to have been suspicious, and asked the child's father whether he suspected abuse. He said he didn't know. They asked him whether he wanted them to report the incident as abuse, and he replied, "if that's what you're supposed to do, do your job." Mrs. Norman told her husband, "it doesn't look like [the child] fell down the steps; he was beat up," but it is unclear whether she told the medical personnel this.

The Act provides that any of a very long list of persons, ranging from physicians to foster parents, homemakers, and child-care workers and clearly encompassing the medical personnel who examined the Norman child, "having reasonable cause to believe a child known to them in their professional or official capacity may be an abused

child or a neglected child shall immediately report or cause a report to be made to the Department." 325 ILCS 5/4. The statute provides criminal and disciplinary sanctions for willful violations, *id.*, 5/4.02, but does not specify any purely civil sanctions, such as damages or injunctive relief. The government concedes that the medical personnel at Great Lakes Naval Hospital violated the Act by failing to report possible abuse of the Norman child.

Twenty-eight days after that incident, Higgs babysat for another Navy family at Great Lakes Naval Base, the Cuylers. Higgs abused the Cuylers' child, inflicting injuries that this time were fatal, and precipitating this lawsuit. (Higgs, though convicted of involuntary manslaughter for the death of the child, is not a defendant in this suit.) The plaintiff argues that her child's death was caused by the Navy personnel's violation of the Illinois abuse-notification statute in regard to the Norman child, and that either there is an implied right of action for damages under the statute, or, if not, then because the statute is intended for the protection of children such as the abused Cuyler child a violation of it is prima facie evidence of negligence under the common law of Illinois. The district court agreed with the plaintiff's second ground and therefore did not address the first, but the plaintiff as is her right asks us to affirm on the first if we disagree with the district court on the second. We begin with the second since it's the one the district court considered.

A conventional principle of tort law, in Illinois as elsewhere, is that if a statute defines what is due care in some activity, the violation of the statute either conclusively or (in Illinois) presumptively establishes that the violator failed to exercise due care. E.g., *Abbasi ex rel.*

Abbasi v. Paraskevoulakos, 187 Ill.2d 386, 240 Ill.Dec. 700, 718 N.E.2d 181, 185 (1999); *Marquay v. Eno,* 139 N.H. 708, 662 A.2d 272, 277 (1995); W. Page Keeton et al., *Prosser and Keeton on the Law of Torts* § 36 (4th ed.1984). But the statutory definition does not come into play unless the tort plaintiff establishes that the defendant owes a duty of care to the person he injured (ordinarily the plaintiff, though in this case the plaintiff's decedent), because tort liability depends on the violation of a duty of care to the person injured by the defendant's wrongful conduct. E.g., *Ward v. K Mart Corp.,* 136 Ill.2d 132, 143 Ill.Dec. 288, 554 N.E.2d 223, 226-27 (1990); *Kirk v. Michael Reese Hospital & Medical Center,* 117 Ill.2d 507, 111 Ill.Dec. 944, 513 N.E.2d 387, 395-96 (1987); *Swett v. Village of Algonquin,* 169 Ill.App.3d 78, 119 Ill.Dec. 838, 523 N.E.2d 594, 597 (1988).

Ordinarily the scope of the tort duty of care – whether it extends to bystanders, customers, investors, unforeseeable plaintiffs (as in the famous *Palsgraf* case), and so forth, see *Edwards v. Honeywell, Inc.,* 50 F.3d 484, 488-90 (7th Cir.1995), and cases cited there – is given by the common law. E.g., *Ward v. K Mart Corp., supra,* 143 Ill.Dec. 288, 554 N.E.2d at 226-27; *Webb v. Jarvis,* 575 N.E.2d 992, 995 (Ind.1991); *Dunphy v. Gregor,* 136 N.J. 99, 642 A.2d 372, 377 (1994); *Calkins v. Cox Estates,* 110 N.M. 59, 792 P.2d 36, 39 and n. 1 (1990); *Oregon Steel Mills, Inc. v. Coopers & Lybrand, LLP,* 336 Or. 329, 83 P.3d 322, 328-29 (2004); *Bernethy v. Walt Failor's, Inc.,* 97 Wash.2d 929, 653 P.2d 280, 282 (1982). And although the legislature can and sometimes does create a duty of care to a new class of injured persons, the mere fact that a statute *defines* due care does not in and of itself create a duty enforceable by tort law. E.g., *Board of Education v. Du Page County*

Election Comm'n, 341 Ill.App.3d 327, 276 Ill.Dec. 195, 793 N.E.2d 954, 957-58 (2003). The distinction is well explained in *Marquay v. Eno, supra,* 662 A.2d at 277: "whether or not the common law recognizes a cause of action, the plaintiff may maintain an action under an applicable statute where the legislature intended violation of that statute to give rise to civil liability. The doctrine of negligence *per se,* on the other hand, provides that where a cause of action does exist at common law, the standard of conduct to which a defendant will be held may be defined as that required by statute, rather than as the usual reasonable person standard." See also *Kansas State Bank & Trust Co. v. Specialized Transportation Services, Inc.,* 249 Kan. 348, 819 P.2d 587, 603 (1991). Otherwise every statute that specified a standard of care would be automatically enforceable by tort suits for damages – every statute in effect would create an implied private right of action – which clearly is not the law. The only modification required to make the passage that we quoted from the *Marquay* case an accurate statement of Illinois law is that in Illinois the violation of a statutory standard of care is prima facie evidence of negligence rather than negligence per se.

From this analysis it follows that only if the Illinois common law of torts imposed on the medical personnel of the Great Lakes Naval Hospital a duty of care to the Cuylers' child would the Illinois notification statute specify the level of care that they owed the child – specify, that is, that due care required taking steps to prevent Higgs from further babysitting until the circumstances in which the Norman child had been injured were clarified. In general, however, tort law imposes on people only a duty to take reasonable care to avoid injuring other people, and

not a duty to rescue others from injuries by third parties, though there are exceptions. For the rule and its exceptions, see our recent discussion in *Stockberger v. United States,* 332 F.3d 479, 480-82 (7th Cir.2003); for the rule in Illinois, see, e.g., *Parra v. Tarasco, Inc.,* 230 Ill.App.3d 819, 172 Ill.Dec. 516, 595 N.E.2d 1186, 1187-90 (1992) ("the common law recognizes no general duty to aid a person in peril"). In other words, there is no general duty in the common law duty to be a "good Samaritan." This principle is well settled in Illinois, as elsewhere. Besides the *Parra* case, see, e.g., *Rhodes v. Illinois Central Gulf R.R.,* 172 Ill.2d 213, 216 Ill.Dec. 703, 665 N.E.2d 1260, 1270 (1996); *Handzel v. Kane-Miller Corp.,* 244 Ill.App.3d 244, 185 Ill.Dec. 72, 614 N.E.2d 206, 208 (1993); *Traudt v. City of Chicago,* 98 Ill.App.2d 417, 240 N.E.2d 188, 191-92 (1968); *Lee v. GNLV Corp.,* 117 Nev. 291, 22 P.3d 209, 212 (2001); *Restatement (Second) of Torts* § 314 (1965); Keeton et al., *supra,* § 56, pp. 375-76. That is why the plaintiff in this case needs the abuse-notification statute to maintain this suit; she has no common law tort claim. (Needless to say, we have no authority to create good Samaritan liability under Illinois law.)

As we noted in *Stockberger,* "If *A* saw that *B* was about to be struck on the head by a flowerpot thrown from a tenth-story window, and *A* knew that *B* was unaware of the impending catastrophe and also knew that he could save *B* with a shout, yet he did nothing and as a result *B* was killed, still, *A*'s inaction, though gratuitous (there was no risk or other nontrivial cost to *A*) and even reprehensible, would not be actionable." 332 F.3d at 480-81. The result would not be changed if there were a statute that made it a crime to fail without justification to try to save an endangered person, unless the statute itself created,

expressly or by implication, a tort remedy for its violation (the second issue in the present case, discussed below). If *B*'s survivors attempted to base liability on the fact that the legislature had declared that due care required a rescue attempt in the circumstances, they would be met with the argument that, while undoubtedly *A had* failed to exercise due care, that could not be a basis for liability because *A* had no duty *to B* to exercise due care.

It would be different if *A* had dropped the flowerpot on *B* and a statute provided that due care required avoiding tossing heavy objects out of upper-floor windows. For in that case, as a matter of tort law, *A* would have a duty to *B*, and the statute would show that he had violated the duty. The common law would create the duty, the statute would define it. That would be a case like *Doe v. Dimovski*, 336 Ill.App.3d 292, 270 Ill.Dec. 618, 783 N.E.2d 193 (2003), on which the plaintiff relies heavily but unavailingly. For here, as in the indistinguishable case of *Parra v. Tarasco, Inc., supra*, 172 Ill.Dec. 516, 595 N.E.2d at 1187-88, there was no duty. Also unavailing is the principle that one who begins a rescue though not required to do so must carry it through nonnegligently, *Wakulich v. Mraz*, 203 Ill.2d 223, 271 Ill.Dec. 649, 785 N.E.2d 843, 854 (2003); *Rhodes v. Illinois Central Gulf R.R., supra*, 216 Ill.Dec. 703, 665 N.E.2d at 1273; *O'Brien v. City of Chicago*, 285 Ill.App.3d 864, 221 Ill.Dec. 134, 674 N.E.2d 927, 935 (1996); *Commercial Union Ins. Co. v. DeShazo*, 845 So.2d 766, 769 (Ala.2002); *Folsom v. Burger King*, 135 Wash.2d 658, 958 P.2d 301, 310 (1998); *Restatement, supra*, § 324; Keeton et al., *supra*, § 56, pp. 377-82, because his attempt at rescue may have deflected other rescuers. Suppose a person is drowning and one of the bystanders says, "Don't worry; I'm a powerful swimmer and I will save him," and

so other bystanders, who are powerful swimmers, remain on shore. The would-be rescuer, however, is merely a braggart, and being a weak swimmer is unable to rescue the drowning person. He would be liable for the person's death. There is nothing of this sort here.

We said there were exceptions to the rule that there is no common law duty to warn or rescue. (We have just mentioned one.) The exception that comes closest to this case is where, as in the famous case of *Tarasoff v. Regents of University of California,* 17 Cal.3d 425, 131 Cal.Rptr. 14, 551 P.2d 334 (1976), a physician or other medical professional fails to warn the potential victims of his patient (whether the patient is a homicidal maniac, as in *Tarasoff,* or a Typhold Mary). See also *Eckhardt v. Kirts,* 179 Ill.App.3d 863, 128 Ill.Dec. 734, 534 N.E.2d 1339, 1342-44 (1989); *Novak v. Rathnam,* 153 Ill.App.3d 408, 106 Ill.Dec. 226, 505 N.E.2d 773, 775 (1987); *Bradshaw v. Daniel,* 854 S.W.2d 865, 871-73 (Tenn.1993); *Hofmann v. Blackmon,* 241 So.2d 752 (Fla.App.1970); cf. *Reisner v. Regents of University of California,* 31 Cal.App.4th 1195, 37 Cal.Rptr.2d 518 (1995). Higgs was not the patient of anyone at Great Lakes Naval Hospital, and so the exception is inapplicable.

Thus Illinois common law did not impose on the hospital's employees a tort duty running to the Cuylers' child, but we must consider whether the Illinois notification statute may have created such a duty. It did not do so expressly. The statute contains no reference to damages or other tort-type remedies. The only sanctions provided are criminal and disciplinary sanctions for willful violations. Nothing in the statute's text indicates that the legislature meant to expand the scope of tort liability to encompass people who fail to report child abuse and are thus analogous

to bystanders who fail to intervene to prevent injuries by third parties. No Illinois case has addressed the question whether, nevertheless, the statute implicitly creates a private right to obtain damages (yet the plaintiff is adamant that we should *not* certify the question to the Supreme Court of Illinois). But an imposing line of cases from other jurisdictions dealing with the private-right question under very similar, indeed materially identical, child-abuse notification statutes, and using a standard similar to that used by the Illinois courts to determine whether to read a damages remedy into a statute ("implication of a private right of action is appropriate when (1) plaintiff is a member of the class for whose benefit the statute was enacted, (2) it is consistent with the underlying purpose of the statute, (3) plaintiff's injury is one the Act was designed to prevent, and (4) it is necessary to provide an adequate remedy for violations of the statute," *Noyola v. Board of Education,* 179 Ill.2d 121, 227 Ill.Dec. 744, 688 N.E.2d 81, 85 (1997)), have held that a private right should *not* be implied. *Arbaugh v. Board of Education,* 214 W.Va. 677, 591 S.E.2d 235, 241 (2003); *C.B. v. Bobo,* 659 So.2d 98, 102 (Ala.1995); *Perry v. S.N.,* 973 S.W.2d 301, 309 (Tex.1998); *Marquay v. Eno, supra,* 662 A.2d at 278; *Kansas State Bank & Trust Co. v. Specialized Transportation Services, Inc., supra,* 819 P.2d at 603-04; *Valtakis v. Putnam,* 504 N.W.2d 264, 266 (Minn.App.1993); *Cechman v. Travis,* 202 Ga.App. 255, 414 S.E.2d 282, 283-84 (1991); *Bradley v. Ray,* 904 S.W.2d 302, 312-14 (Mo.App.1995); *Fischer v. Metcalf,* 543 So.2d 785, 788-91 (Fla.App.1989); *Borne by Borne v. Northwest Allen County School Corp.,* 532 N.E.2d 1196, 1203 (Ind.App.1989); but see *Landeros v. Flood,* 17 Cal.3d 399, 131 Cal.Rptr. 69, 551 P.2d 389, 396-98 (1976).

We think that those decisions are correct (the one outlier, *Landeros,* is not in point, as the court confined private actions to deliberate violations of the statute at issue) and that the Supreme Court of Illinois will fall in line with them, especially given that court's increasing reluctance to imply private rights of action, a reluctance well illustrated by its very recent decision in *Metzger v. DaRosa*, 2004 WL 335025 (Ill. Feb.20, 2004). It is of some significance that in the almost 30 years in which ANCRA has been on the books, no cases have been reported in which a tort suit was premised on a failure to report potential abuse, in violation of the statute.

The fact that the only sanction the legislature has provided is for a *willful* violation (which is not alleged in this case) suggests a reluctance to impose liability for merely negligent violations, and this is understandable for a variety of reasons. One is that the legislators were clearly worried about the harm to people falsely or mistakenly accused of child abuse, and so imposed a criminal penalty for knowingly false reporting. 325 ILCS 5/4. Another is the vast range of persons encompassed by the reporting requirement. A "homemaker" who not willfully but merely carelessly failed to report suspected abuse by a babysitter, perhaps fearing that the babysitter would sue her for defamation, see *Brown v. Farkas,* 158 Ill.App.3d 772, 110 Ill.Dec. 823, 511 N.E.2d 1143, 1146-47 (1986); *Bogosian v. Board of Education,* 134 F.Supp.2d 952, 954-55 (N.D.Ill.2001), might on the plaintiff's view of the statute find herself sued years later because the babysitter had abused *another* child.

Maybe such encompassing liability would be a good thing; it would doubtless lead to more reporting. It is usually the case that piling on punishments will increase

compliance with a statute. But if that were the only consideration, all statutes would be interpreted to create private rights of action. Such piling on in the case of ANCRA would place even nonprofessionals, such as homemakers, on a razor's edge, where they could be faced with suit whether they did or did not report an incident that might involve child abuse. It is true that there is a statutory safe harbor for "good faith" mistaken reporting of abuse and even a presumption of good faith, 325 ILCS 5/9, but what is good faith in a particular case remains a litigable issue. It may be significant that since being enacted, the abuse-notification statute has been amended several times, any one of which would have provided an occasion for plugging in a damages remedy had there been legislative sentiment for such a remedy; evidently there was not.

Another point, this one well illustrated by the facts of this case and a possible reason behind the common law's settled reluctance to create good Samaritan liability (part of a more general conservatism, further illustrated by the common law's refusing to create a remedy in cases of wrongful death – in Illinois as elsewhere, suits for wrongful death are entirely creatures of statute, *Pasquale v. Speed Products Engineering,* 166 Ill.2d 337, 211 Ill.Dec. 314, 654 N.E.2d 1365, 1378 (1995); *Florida Convalescent Centers v. Somberg,* 840 So.2d 998, 1001 (Fla.2003); *Franklin v. Franklin ex rel. Phillips,* 858 So.2d 110, 115 (Miss.2003); *Etling v. Westport Heating & Cooling Services, Inc.,* 92 S.W.3d 771, 773 (Mo.2003) (en banc)), is that issues of causation tend to be more difficult to resolve in a case of nonfeasance, which is what good Samaritan liability is, than in one of misfeasance. See Keeton et al., *supra,* § 56, p. 376. Suppose the Great Lakes Naval Hospital had

promptly reported the abuse of the Norman child to the state's child welfare department. What would have ensued? Would Higgs, who did not admit having abused the child, have been arrested? Probably not without an investigation, which might have taken more than 28 days to complete. Of course, just the commencement of an investigation might well have deterred her from further child abuse, but that is speculation too. The speculative character of causal inquiries in good Samaritan cases is another reason to doubt that the Illinois legislature intended to create tort liability by enacting a statute that does not purport to do so.

We conclude that the judgment for the plaintiff must be reversed and the suit dismissed.

REVERSED.

37 F.Supp.2d 1099

United States District Court,

N.D. Illinois,

Eastern Division.

Gretchen D. CUYLER, Special Administrator of the Estate of Christian Cuyler, deceased, Plaintiff,

v.

The UNITED STATES of America, Defendant.

No. 98 C 3786.

March 9, 1999.

Randall F. Peters, Randall F. Peters & Associates, Chicago, IL, William Lawrence Suhadolnik, Simonian & Suhadolnik, Waukegan, IL, for plaintiff.

Matthew David Tanner, Asst. U.S. Atty., United States Attorney's Office, Chicago, IL, for defendant.

MEMORANDUM OPINION AND ORDER

MAROVICH, District Judge.

Plaintiff Gretchen D. Cuyler ("Cuyler"), Special Administrator of the Estate of Christian Cuyler ("Decedent"), deceased, filed a Complaint against the United States of America ("United States") pursuant to the Federal Tort Claims Act, 28 U.S.C. § 1346(b). The United States presently moves to dismiss Cuyler's Complaint pursuant to Rule 12(b)(6) of the Federal Rules of Civil Procedure. For the reasons set forth below, the Court denies the motion.

BACKGROUND[1]

For "a long period of time prior to September 1, 1994," Edwena D. Higgs ("Higgs") allegedly operated and provided unauthorized, officially unapproved and unlicenced day care and babysitting services. (Cmplt.¶ 6.) Higgs, a dependant of an enlisted individual with the Navy, allegedly provided these services in officially assigned United States Naval Housing in Great Lakes, Illinois "with the actual and/or constructive knowledge of the United States Navy." (*Id.*)

On or about August 1, 1994 through August 4, 1994, Higgs babysat Antonious Norman ("Baby Norman"), the sixteen month old son of an active Navy enlisted man, Anthony Norman ("Norman"). Cuyler alleges that, during the babysitting, Higgs physically beat and abused Baby Norman, causing him to sustain certain external and readily-apparent visible injuries. When Norman observed his son's injuries after picking him up from Higgs' residence on August 4, 1994, Norman took his son to the Great Lakes Naval Hospital for emergency medical care and treatment.

At the hospital, the hospital personnel who examined and treated Baby Norman, including certain nurses and doctors, were allegedly advised of the suspected beating committed upon the baby by Higgs at her base housing. The various medical personnel, including nurses and attending physicians, allegedly advised Norman that "they

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[1] The Court has taken these facts from the well-pleaded allegations contained in Cuyler's Complaint which, for purposes of the United States' motion to dismiss, are deemed true. *See e.g., Jones v. General Elec. Co.*, 87 F.3d 209, 211 (7th Cir.1996).

would, pursuant to standing orders, procedures and protocol, report and undertake an investigation of his report and suspicions of physical abuse and the beating of his son by . . . Higgs while he was being provided babysitting and day care services at the . . . base housing." (*Id.* ¶ 10.) Cuyler's Complaint alleges, however, that Higgs' alleged abuse of Baby Norman went unreported.

On September 1, 1994, Higgs babysat the Decedent at her Navy base housing. Allegedly, Higgs negligently and/or intentionally physically abused the Decedent, resulting in the Decedent sustaining personal injuries which ultimately resulted in his death later in the day on September 1, 1994.

Cuyler's Complaint alleges that the United States had a duty, through its agents, to provide safety and security for the foreseeable and intended Navy personnel and dependents, including the Decedent. Cuyler alleges that the United States breached that duty by:

> . negligently and carelessly fail[ing] to follow "NAVHOSPGLAKESINST 6320.57C" in direct contradiction and contravention of standing orders, regulations and protocol of the Department of Defense and Department of Navy;
>
> . negligently and carelessly fail[ing] to advise the Nurse of the Day, the Medical Officer of the Day or Family Advocacy Representative of the suspected severe physical abuse perpetrated by . . . Higgs on [Baby] Norman, while said child was in her exclusive care, custody and control on or about August 4, 1994 and the days preceding that date, in violation of NAVHOSPGLAKESINST 6320.57C and/or other orders, regulations or protocol;

> . negligently and carelessly fail[ing] to advise or report procedures of all suspected child abuse/neglect to the State of Illinois Department of Children and Family Services ("DCFS") on the 24 hour hotline, as required by NAVHOSP-GLAKESINST 6320.57C and/or other orders, regulations, or protocol; and
>
> . were otherwise careless and negligent in the administration and operation of the Great Lakes Naval Hospital.

(*Id.* ¶ 13.) Cuyler alleges that the above breaches of duty by agents of the United States were the proximate cause of the Decedent's injuries and subsequent death.

On or about August 26, 1996, Cuyler presented her claim for personal injuries to the Commanding Officer of the Naval Legal Services Officer, Great Lakes, Illinois. On December 19, 1997, Cuyler's claim was denied by the Commanding Officer of the Judge Advocate General's Corps, Navy Legal Service Office Central in Pensacola, Florida.

On June 18, 1998, Cuyler filed her Complaint in this Court, seeking compensatory damages for wrongful death (Count I) and survival (Count II). The United States now moves to dismiss Cuyler's Complaint pursuant to Fed.R.Civ.P. 12(b)(6), asserting that Cuyler's Complaint fails to state a claim upon which relief can be granted.

DISCUSSION

I. *Standards for Motion to Dismiss*

When reviewing a motion to dismiss, the Court examines the sufficiency of the complaint rather than the

merits of the lawsuit. *Triad Assoc. v. Chicago Hous. Auth.*, 892 F.2d 583, 586 (7th Cir.1989). "[T]he issue is not whether a plaintiff will ultimately prevail but whether the claimant is entitled to offer evidence that supports the claims." *Scheuer v. Rhodes,* 416 U.S. 232, 236, 94 S.Ct. 1683, 40 L.Ed.2d 90 (1974). A motion to dismiss will be granted only if the Court finds that the plaintiff can put forth no set of facts that would entitle her to relief. *See Venture Assoc. Corp. v. Zenith Data Systems Corp.,* 987 F.2d 429, 432 (7th Cir.1993); *Conley v. Gibson,* 355 U.S. 41, 45-46, 78 S.Ct. 99, 2 L.Ed.2d 80 (1957). On a motion to dismiss, the Court draws all inferences and resolves all ambiguities in the plaintiff's favor and assumes that all well-pleaded facts are true. *See Dimmig v. Wahl,* 983 F.2d 86, 87 (7th Cir.1993).

II. *Liability under the Federal Tort Claims Act*

The Federal Tort Claims Act ("FTCA") grants the federal district courts jurisdiction over a category of claims for which the United States has waived its sovereign immunity and rendered itself liable. *See* 28 U.S.C. § 1346(b); *Federal Deposit Ins. Corp. v. Meyer,* 510 U.S. 471, 477, 114 S.Ct. 996, 127 L.Ed.2d 308 (1994). Under the FTCA, the government is liable for the negligent conduct of an employee "while acting within the scope of his office or employment" under circumstances where "a private person[] would be liable to the claimant in accordance with the law "of the place where the act or omission occurred." 28 U.S.C. § 1346(b)(1).

The Supreme Court has "consistently held that § 1346(b)'s reference to the 'law of the place' means law of the State – the source of substantive liability under the

FTCA." *Meyer,* 510 U.S. at 478, 114 S.Ct. 996. As such, "for liability to arise under the FTCA, the plaintiff's cause of action must be 'comparable' to a 'cause of action against a private citizen' recognized in the jurisdiction where the tort occurred, and the allegations, taken as true, must satisfy the necessary elements of that comparable state cause of action." *Bergquist v. United States,* 849 F.Supp. 1221, 1232 (N.D.Ill.1994) (quoting *Chen v. United States,* 854 F.2d 622, 626 (2d Cir.1988)).

As an initial matter, Cuyler asserts that her allegation that the government violated particular Naval regulations, by itself, supports a negligence claim. (Pl.Resp. at 2.) The Court disagrees. "Simply alleging violations of the Federal Constitution, federal statutes or federal regulations does *not* satisfy the FTCA's 'law of the place' requirement." *Bergquist,* 849 F.Supp. at 1232. "The negligent performance of duties embodied in federal statutes and regulations may give rise to a claim under the FTCA, but only if there are analogous duties under local tort law." *Id.* (citing *Art Metal-U.S.A., Inc. v. United States,* 753 F.2d 1151, 1157-58 (D.C.Cir.1985)). Thus, for Cuyler's action to be cognizable under the FTCA, Illinois law – the law of the place where the alleged negligent acts occurred – must recognize a claim for negligence under the circumstances here.

In answering the above issue, there are some undisputed matters. First, Illinois, like many states, has enacted a statute – the Abused and Neglected Child Reporting Act (the "Child Abuse Reporting Act") – mandating that medical caregivers, teachers and designated others promptly report signs of child abuse to the appropriate authorities. *See* 325 ILCS 5/1 *et seq.* Second, the Child Abuse Reporting Act provides for criminal penalties

(or, in the case of physicians, professional discipline) for willful failure to report. *See* 325 ILCS 5/4.02. Third, no Illinois court has expressly addressed whether, in light of the Illinois reporting statute or otherwise, there is a private cause of action based on a failure to report suspected child abuse.

In its motion to dismiss, the United States asserts that Illinois courts would not recognize a civil cause of action under the circumstances here. As support, the government directs this Court to precedent from other states which have declined to create a private cause of action in similar situations involving state reporting statutes. *See Perry v. S.N.*, 973 S.W.2d 301, 309 (Tex.1998); *Letlow v. Evans*, 857 F.Supp. 676, 678 (W.D.Mo.1994); *Vance v. T.R.C.*, 229 Ga.App. 608, 494 S.E.2d 714, 716-17 (1997); *J.A.W. v. Roberts*, 627 N.E.2d 802, 813 (Ind.Ct.App.1994). The government further asserts that even if Illinois recognized a private cause of action for failure to report, extending the government's duty to a child who is not the same child whose abuse it failed to report would be unprecedented.

For starters, this Court need not address whether the Illinois Child Abuse Reporting Act affords an implied private cause of action. Cuyler's Complaint does not seek relief based on any such implied private cause of action under the Child Abuse Reporting Act, but instead asserts that the government's actions constituted "negligence." As such, the Court turns to Illinois law to determine whether Cuyler's Complaint states a negligence claim.[2]

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[2] A federal district court considering state law must attempt to predict how the state supreme court would decide the issue presented.

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As Cuyler asserts (*see* Pl.Resp. at 2), the Illinois Supreme Court has repeatedly held that "the violation of a statute or ordinance designed to protect human life or property is prima facie evidence of negligence." *Noyola v. Board of Educ. of the City of Chicago,* 179 Ill.2d 121, 129, 227 Ill.Dec. 744, 688 N.E.2d 81, 84 (1997) (citing cases); *Kalata v. Anheuser-Busch Cos.,* 144 Ill.2d 425, 434, 163 Ill.Dec. 502, 581 N.E.2d 656, 661 (1991). *See also Enis v. Ba-Call Bldg. Corp.,* 639 F.2d 359, 362 (7th Cir.1980). The Illinois Supreme Court has elaborated on this principle as follows:

> Underlying these cases is the notion that statutes and ordinances designed to protect human life or property establish the standard of conduct required of a reasonable person. In other words, they fix the measure of legal duty. Where a defendant violates one of these statutes or ordinances, a plaintiff who belongs to the class intended to be protected by that statute or ordinance and whose injury is of the type the statute or ordinance was intended to protect against may recover upon establishing that the defendant's violation proximately caused plaintiff's injury.

Noyola, 179 Ill.2d at 129-30, 227 Ill.Dec. 744, 688 N.E.2d at 84-85 (citations omitted).

See, e.g., Allen v. Transamerica Ins. Co., 115 F.3d 1305, 1309 (7th Cir.1997). "Although the decision of a state's intermediate court is not a conclusive interpretation of state law in the same sense as a decision of the state's highest court, it illuminates the meaning of state law and should be followed 'unless there are persuasive indications that the [state's] Supreme Court would decide the issue differently.'" *Burns Philp Food, Inc. v. Cavalea Continental Freight, Inc.,* 135 F.3d 526, 528 (7th Cir.1998) (quoting *Allen,* 115 F.3d at 1309).

Cuyler's allegations satisfy a claim for negligence based on a violation of an Illinois public safety statute. First, there is no doubt that the Illinois legislature intended the Illinois Child Abuse Reporting Statute to be a "public safety statute."[3] The application section of the statute states:

> The Illinois Department of Children and Family Services shall, upon receiving reports made under this Act, protect the best interests of the child, offer protective services in order to prevent any further harm to the child and to other children in the same environment or family . . . and protect the health and safety of children in all situations in which they are vulnerable to child abuse and neglect. Recognizing that children also can be abused and neglected while living in public or private residential agencies or institutions meant to serve them, while attending day care centers or schools, or when in contact with adults who are responsible for the welfare of the child at that time, this Act also provides for the reporting and investigation of child abuse and neglect in such instances.

325 ILCS 5/2. *See also Pesce v. J. Sterling Morton High Sch.*, 830 F.2d 789, 798 (7th Cir.1987) (recognizing

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[3] In ascertaining legislative intent, a court first considers the language of the statute itself, as that is the best indication of the drafters' intent. *See Moore v. Lumpkin*, 258 Ill.App.3d 980, 989, 196 Ill.Dec. 817, 824, 630 N.E.2d 982, 989 (1st Dist.1994). Where the legislature's intent can be determined by looking to the language of the statute, giving the words their ordinary meanings unless otherwise indicated, that intent must be given effect without resort to other means of statutory construction. *Id.* The statute should be read as a whole, considering each relevant section as it relates to other sections. *Id.*

that "Illinois . . . has adopted measures seeking to uncover instances of child abuse in order to protect children from subsequent abuse"). The protection sought by the Illinois Child Abuse Reporting Act clearly compares with other statutes that the Illinois Supreme Court has found to be "public safety statutes." *See, e.g., Kalata,* 144 Ill.2d at 435, 163 Ill.Dec. 502, 581 N.E.2d at 661 (finding that city ordinance setting handrail requirements for stairway was a public safety measure); *French v. City of Springfield,* 65 Ill.2d 74, 79, 2 Ill.Dec. 271, 357 N.E.2d 438, 440 (1976) (finding that city ordinance which required a permit to be issued before barricades could be stationed on the street was a public safety measure).

Moreover, considering the clear intent of the statute, there can be no doubt that the Decedent was an intended beneficiary of the Child Abuse Reporting Act. As noted above, the Child Abuse Reporting Act was enacted, in part, to "offer protective services in order to prevent any further harm to the child and to other children in the same environment or family . . . and protect the health and safety of children in all situations in which they are vulnerable to child abuse and neglect." 325 ILCS 5/2.

Here, the Decedent easily falls within the intended beneficiaries of the statute – he was a member of a particular, identifiable group of children who were being babysat, allegedly with the knowledge of the government, by an alleged child abuser.[4] It is equally clear that the

[4] "Child" is defined in the Illinois Child Abuse Reporting Act as "any person under the age of 18, unless legal emancipated by reasons of marriage or entry into a branch of the United States armed services." 325 ILCS 5/3. Although Cuyler's Complaint does not state the Decedent's age at the time of his death, the Court infers from the surround-

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Decedent's injury – his death, allegedly due to abuse – was "the type of injury the statute . . . was intended to protect against." Under the circumstances here, the Court agrees with Cuyler that her allegations state a claim of negligence upon which relief may be granted.[5]

The Court finds the government's assertion that "the legal duty plaintiff would impose on the Navy . . . knows no bounds, and would tear the notion of duty from its moorings" to be mistaken. (*See* Def. Reply at 7.) As noted above, a violation of a public safety statute such as the Child Abuse Reporting Act "fix[es] the measure of legal duty." *See Noyola,* 179 Ill.2d at 130, 227 Ill.Dec. 744, 688 N.E.2d at 85. Here, the act expressly stated its intention to "prevent any further harm to the [abused] child *and to other children in the same environment* or family." 325 ILCS 5.2 (emphasis added). Therefore, instead of "know[ing] no bounds," the legal duty asserted by Cuyler fits well within the expressly intended boundaries of the Illinois statute.[6]

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ing facts in the Complaint that he meets the definition of "child" under the Child Abuse Reporting Act.

[5] Cuyler additionally asserted that certain Illinois courts have already recognized a common law tort claim against mandated reporters who failed to report suspected abuse. (Pl.Resp. at 3-4 (*citing Dupree v. County of Cook,* 287 Ill.App.3d 135, 222 Ill.Dec. 504, 677 N.E.2d 1303 (1st Dist.1997); *Doe v. Montessori School of Lake Forest,* 287 Ill.App.3d 289, 223 Ill.Dec. 74, 678 N.E.2d 1082 (2d Dist.1997).)) The Court's review of the cases cited by Cuyler demonstrates that they did not expressly consider whether civil actions may be based on the Child Abuse Reporting Act; nevertheless, the courts did appear to tacitly acknowledge the possibility for such civil actions.

[6] Because the Illinois Child Abuse Reporting Act contains the express intention of the Illinois legislature to prevent harm to other children in the same environment as abused children, the Court finds

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In sum, the Illinois Supreme Court has made it clear that "[w]here a defendant violates [a public safety statute], a plaintiff who belongs to the class intended to be protected by that statute . . . and whose injury is of the type the statute . . . was intended to protect against may recover upon establishing that the defendant's violation proximately caused plaintiff's injury." *Noyola,* 179 Ill.2d at 130, 227 Ill.Dec. 744, 688 N.E.2d at 85. *See also Calloway v. Kinkelaar,* 168 Ill.2d 312, 319-20, 213 Ill.Dec. 675, 659 N.E.2d 1322, 1326 (1995). Because Cuyler's allegations state a claim for negligence based upon a violation of a public safety statute, the government's motion to dismiss is denied.

CONCLUSION

For the above reasons, the United States' motion to dismiss is denied.

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that this case is distinguishable from the decisions of other jurisdictions cited by the government considering different state reporting statutes. *See, e.g., Curran v. Walsh Jesuit High Sch.,* 99 Ohio App.3d 696, 651 N.E.2d 1028 (1995); *Marcelletti v. Bathani,* 198 Mich.App. 655, 500 N.W.2d 124 (1993).

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF ILLINOIS
EASTERN DIVISION

GRETCHEN CUYLER, Special Administrator of the Estate of CHRISTIAN CUYLER, deceased,	)
Plaintiff,	) Hon. Blanche M. Manning
v.	) Case No. 98 C 3786
THE UNITED STATES OF AMERICA,	)
Defendant.	)

MEMORANDUM AND ORDER

Plaintiff Gretchen Cuyler, as administrator of the estate of her deceased son ("the Decedent") brings this action pursuant to the Federal Tort Claims Act, alleging that Defendant United States of America is liable for the death of the Decedent, which occurred at Great Lakes Naval Base ("Great Lakes").[1]

Pursuant to Federal Rule of Civil Procedure 52, after carefully observing the trial and reviewing the transcript and trial exhibits, the Court hereby enters the following written findings of fact and conclusions of law based upon consideration of all the admissible evidence as well as this Court's own assessment of the credibility of the trial witnesses. To the extent, if any, that findings of fact may be considered conclusions of law, they will be deemed

[1] Because Cuyler alleges that the death of her son was caused by the actions of the United States Navy, the Court will refer to Defendant as "the Navy."

conclusions of law. Similarly, to the extent that matters expressed as conclusions of law may be considered findings of fact, they will also be deemed findings of fact.

FINDINGS OF FACT

Plaintiff Gretchen Cuyler, was the mother of Decedent, Christian Cuyler, who was born on March 13, 1993, and died on September 1, 1994, at 17 months of age, from injuries inflicted by his babysitter, Edwina Higgins, on August 24, 1994. The Decedent's injuries included multiple skull fractures, epidural hematoma, brain damage, lacerated liver, lacerated mesentery, fractured ribs, and other multiple blunt trauma. Ms. Higgins was subsequently convicted of involuntary manslaughter in Illinois state court.

Daryl Cuyler was the father of the Decedent and a member of the Navy. During the relevant time period, August 4, 1994 to September 1, 1994, Plaintiff, Decedent, and Mr. Cuyler all resided at Great Lakes in Navy subsidized housing.[2]

Ms. Higgins, the wife of an enlisted Navy serviceman, also resided in official Navy housing at Great Lakes. At least during the relevant period, Ms. Higgins provided unauthorized childcare to at least two children of naval personnel. Navy regulations prohibited residents living in naval housing from providing more than 10 hours a week of unauthorized childcare services. To provide more than 10 hours a week, a person needed to apply to the Navy to

[2] Because the relevant event here took place in 1994, all laws and regulations discussed herein are those that were in effect in 1994.

become an authorized childcare provider. Persons who violate this regulation received a warning. If they continued to provide unauthorized childcare, they faced the possibility of being evicted from Navy housing.

In addition to the Decedent, on August 1-4, 1994, Ms. Higgins babysat for Charlene Randolph Norman ("the Norman Child"), who was 14 months of age at the time. While in her care, Ms. Higgins abused the Norman Child causing her to sustain injuries, including a lesion and cuts on her forehead and other scratches and abrasions.

Due to these injuries, the Norman Child was admitted to the Great Lakes Naval Hospital emergency room. The Navy medical personnel, however, did not report these injuries, which the Navy admits indicated a suspicion of child abuse, to either the Illinois Department of Children and Family Services ("DCFS") or the Navy Family Advocate Program ("FAP"), as required by the Illinois Abused and Neglected Child Reporting Act ("the Reporting Act") (325 ILCS 5/1, *et seq.*) and Navy regulations (NAVHOSPGLESINST 6320.57C (PL's Trial Ex. 3)).

As a result of failing to report the abuse to either the DCFS or the FAP, neither of these agencies nor any law enforcement agencies knew of the suspected abuse or unauthorized baby sitting, and therefore, did not investigate Ms. Higgins. Not until the investigation of the abuse of the Decedent did the DCFS or the FAP learn of the abuse of the Norman Child.

The Navy has admitted that it had a duty to report the suspected abuse of the Norman Child under the Reporting Act and Navy regulations and that it knew of or had actual notice of the abuse and that Higgins was providing unauthorized childcare services. The Navy

admits that it negligently breached its duty to report the suspected abuse, as required by Illinois statute and Navy regulations, to the DCFS and FAP. The Navy, however, contends that it is not liable because its negligent breach of this duty did not proximately cause the injuries to the Decedent.

In 1994, reports of abuse to the DCFS resulted in the initiation of an investigation within 24 hours. Within seven days, an investigator would then interview the child and the alleged perpetrator and others with information about the suspected abuse. The final determination of whether abuse had occurred would take between 30 to 60 days, with 80% of the cases resolved in 30 days. To ensure the safety of the child in the interim, the DCFS would often take temporary measures such as instructing the suspect not to engage in any childcare services until the DCFS concluded its investigation. To ensure compliance with this request, the DCFS could conduct unannounced drop-in visits to the suspect's home. If the suspect continued providing childcare, the DCFS could then get a restraining order from the court.

Whether or not the DCFS took the above measures was dependent on the risk to the child. Generally, the younger the child, the more at risk the DCFS considered the child to be in, and thus, would be more likely to take protective measures to ensure the safety of the child.

Similar to the DCFS, the FAP had its own procedures to investigate suspected child abuse. These procedures included interviewing the suspect and the child and requesting the suspect not to provide any childcare services until the investigation was completed. The final determination of abuse in 1994 typically took anywhere

from one to three months to complete. Where the FAP discovered that the suspect was providing unauthorized childcare, within 24 to 48 hours, the FAP would give the suspect a warning to cease this activity. If they were caught again, the suspect faced the possibility of being evicted from Navy housing.

Expert Witnesses

Three expert witnesses testified at trial. Cleo Terry testified for Cuyler and Michael Sumski and Catherine Loisel testified for the Navy.

Cleo Terry

Cleo Terry, who testified as a paid expert for Cuyler, is a licensed social worker in Illinois and has a master's degree in sociology. She has more than 25 five [sic] years experience in working with various private and governmental social service agencies in the area of child protection services. From 1978 to 1994, she worked for the DCFS, as a trainer of child protection investigators and a regional manager. As a manager, she was responsible for supervising all investigations in a seven-county region, which included Great Lakes.

Ms. Terry testified that in 1994, 80% of all child abuse investigations were completed within 30 days. During the pendency of the investigation, "it was quite common" for investigators to instruct the suspect not to provide any childcare services until the investigation was completed. The policy of the DCFS was to "err on the side of protecting children." Therefore, because infants were at the

highest risk of injury of abuse, the DCFS would "routine[ly]" request the suspect to refrain from childcare services.

While compliance with these cease and desist requests were "not universal" it was "quite common." In Ms. Terry's opinion, based on her 25 years of experience, the alleged suspect would ordinarily stop providing childcare services because the suspect would be intimidated by the investigation and the "cloud of suspicion" and "fear of further repercussions to them criminally." If voluntary compliance was unsuccessful, Ms. Terry stated that the DCFS could take further action such as "unannounced home visits" or court orders. On cross-examination, however, Ms. Terry testified that drop-in visits and court orders were uncommon.

Ms. Terry opined that, based on the facts of this case and her experience, if the DCFS was properly alerted to the abuse on August 4, 1994, it would have followed its standard procedures and initiated an investigation within 24 hours and within seven days, interviewed the Norman Child, his parents, Ms. Higgins, and the medical personnel who examined the child. The DCFS would also have requested that Ms. Higgins not babysit for any other child until it had completed its investigation. To ensure compliance, Ms. Terry stated that the DCFS "had the ability to do unannounced home visits."

In addition to the DCFS investigations, the FAP would also initiate an investigation. According to Ms. Terry, based on her reading of the Navy's regulations, before making a final report, the FAP had the power to evict abusers or persons providing uncertified childcare services, make a report to the suspect's commanding officer, and conduct unannounced home visits.

Based on the above, Ms. Terry testified that, based on her experience working at DCFS and with the Navy and her reading of the Navy's regulations, if the Navy had filed a report, as it was required to do, "it is reasonably certain" that Ms. Higgins would not have babysat the Decedent 28 days after she abused the Norman baby. She agreed that the failure to report the suspected abuse "substantially increased the risk of harm to [the Decedent]" because it was foreseeable that Ms. Higgins would not stop her abuse. Ms. Terry based these opinions on the fact that the DCFS would most likely have requested Ms. Higgins to cease providing childcare services and that people generally complied with these requests and the fact that Ms. Higgins was the spouse of an enlisted Navy serviceman who lived in Navy subsidized housing, and therefore, was more likely to comply because she faced consequences from the Navy, such as eviction from Navy housing or a letter sent to her husband's commanding officer.

Michael Sumski

Mr. Sumski, who testified for the Navy pursuant to a subpoena, has worked for the DCFS for 22 years. As an investigator he conducted approximately 800 investigations. Since 1998 he has been the quality assurance administrator for DCFS.

Based on his experience and reviewing DCFS statistics, Mr. Sumski testified that in 1994, DCFS investigations into suspected abuse took a median of 14 days and an average of 21 days. The length of the investigation depended on factors such as the seriousness of the abuse, the number of people to be interviewed, and the total number of pending investigations. The DCFS had a "3-tier

priority system" which determined how quickly the case would be investigated. Generally, the more serious the risk of injury to the child, the higher priority the investigation would received from DCFS.

Mr. Sumski testified that an investigation of the Norman Child would have taken from 30 to 60 days to complete based on the fact that in 1994 there was a large backlog of reports of abuse, the abuse was not that serious, and the investigator would have had to interview "multiple households" (both the Normans and the Higgins).

In regards to interim measures the DCFS could have taken in 1994, Mr. Sumski stated that the investigator could have requested the suspect not to babysit until the investigation was completed. However, such requests did not happen in every case. Whether the investigator made a request depended upon the investigator's experience, the seriousness of the injury, and whether the injuries were the result of abuse or negligence. While the DCFS did unannounced drop-in visits to ensure compliance, such visits were not required and were not common.

Mr. Sumski also testified that it was impossible to determine whether an individual suspect would have complied with the request not to babysit. According to Mr. Sumski, based on his experience, persons who abuse children, such as Ms. Higgins, fall within a group of people who do not perceive an investigation as a threat and therefore do not cease providing childcare services. On cross-examination, however, Ms. Sumski testified that Ms. Higgins might have followed the request not to babysit. He also admitted that his opinions did not take into account any additional pressures which could have been exerted on Ms. Higgins from the FAP or other naval agencies.

Consequently, based on his experience, Mr. Sumski stated that, in his professional opinion, if the abuse of the Norman Child had been reported, the DCFS could not have prevented Ms. Higgins from babysitting the Decedent.

Catherine Loisel

Ms. Loisel, who testified for the Navy, has been employed by the Navy for the last 20 years with the FAP. She currently is a case manager and responsible for investigating the validity of reports of suspected child abuse. She also helped draft the Navy's regulations for Great Lakes dealing with childcare and child abuse and neglect, the same regulations that Ms. Terry relied on for her testimony and report.

Based on her experience with the FAP, Ms. Loisel testified that Ms. Terry incorrectly construed some of the Navy's policies and actions which the FAP could undertake to deal with suspected child abusers and persons who provide unauthorized childcare. According to Ms. Loisel, the FAP did not have a policy or practice at the initial stages of an investigation. The FAP would send a letter to the commanding officer of the suspect or the suspect's spouse, if the suspect was a civilian. Moreover, the FAP did not have any authority to evict civilians from naval housing for providing unauthorized childcare. However, Ms. Loisel testified that another agency did have the authority to do so and that housing at Great Lakes was a "sought after commodity."

Ms. Loisel testified that the FAP investigated suspected child abuse by the spouses of enlisted sailors and that such investigations were generally completed in one

to three months. In making an assessment of alleged child abuse, the FAP investigator would generally interview the suspect and the victim. Where an unauthorized babysitter was charged with abuse, the FAP investigator would request that the suspect refrain from babysitting until the completion of the assessment.

Upon a report of unauthorized childcare, the FAP would make a home visit within 24 to 48 hours. If it found unauthorized babysitting, the FAP would then advise the person to cease this activity until obtaining certification. Where a person continued to conduct unauthorized babysitting, after three warnings, the person could be referred to the agency which governs naval housing for possible eviction, which would take longer than 30 days.

CONCLUSIONS OF LAW

The Navy has admitted that it negligently breached its duty to report the abuse of the Norman Child, as required by the Reporting Statute and Navy regulations, to the DCFS and FAP. Therefore, the only question concerning liability is whether the Navy's negligent breach proximately caused the death of the Decedent. The Court will thus discuss: (I) proximate cause; and (II) Cuyler's alleged damages.

I. Proximate Causation

Under Illinois law, proximate cause encompasses two distinct requirements: (A) cause in fact; and (B) legal cause. *Lee v. Chicago Transit Authority*, 605 N.E.2d 493, 502 (Ill. 1992). The plaintiff bears the burden of establishing proximate cause, *Korando v. Uniroyal Goodrich Tire*

Co., 637 N.E.2d 1020, 1024 (Ill. 1994), to a "reasonable certainty," *Chelkova v. Southland Corp.*, 771 N.E.2d 1100, 1111 (Ill. App. Ct. 2002), by a preponderance of the evidence. *Reardon v. Bonutti Orthopaedic Serv., Ltd.*, 737 N.E.2d 309, 318 (Ill. App. Ct. 2000). While the plaintiff may prove proximate cause by circumstantial evidence, *Stojkovich v. Monadnock Building*, 666 N.E.2d 704, 709 (Ill. App. Ct. 1996), proximate cause may not be premised upon "surmise or conjecture as to the cause of the injury." *Lee*, 605 N.E.2d at 503. "The causal connection must not be contingent, speculative or merely possible," *Suspis v. Radfar*, 739 N.E.2d 960, 967 (Ill. App. Ct. 2000).

Cause in fact exists where there is a reasonable certainty that a defendant's acts caused the injury or damage. *Lee*, 605 N.E.2d at 502. A defendant's conduct is a cause in fact of the plaintiff's injury only if that conduct is a material element and a substantial factor in bringing about the injury ("the substantial factor test").[3] *Id.* If there is more than one possible cause, the actions of the defendant "need not be . . . the most significant cause; it only need have been a substantial cause of [the plaintiff's] injuries." *Erickson v. Baxter Healthcare, Inc.*, 151 F. Supp. 952, 968 (N.D. Ill. 2001) (*citing Leonardi v. Loyola Univ. of Chicago*, 658 N.E.2d 450, 455 (Ill. 1995). A defendant's conduct is a material element and substantial factor in

[3] Relying on *Rodriguez v. Glock*, 28 F. Supp. 2d 1064, 1070 (N.D. Ill. 1998), the Navy asserts that this Court should apply the "but for rule" instead of the "substantial factor test" in determining cause in fact. Reviewing recent Illinois Supreme Court decisions, this Court finds that Illinois appears to have veered away from the "but for rule" in favor of the "substantial factor test." *See, e.g., First Sprigfield Bank & Trust v. Galman*, 720 N.E.2d 1068, 1072 (Ill. 1999); *Lee*, 605 N.E.2d at 502-03.

bringing about the injury if, absent that conduct, the injury would not have occurred. *Lee*, 605 N.E.2d at 502.

Legal cause is essentially a question of foreseeability. *Id.* at 503. The relevant inquiry is whether the injury is of a type that a reasonable person would see as a likely result of his or her conduct. *Id.* The defendant's actions are not the legal cause of the injury if the injury was not a reasonably foreseeable result of the negligence. *Ney v. Yellow Cab Co.*, 117 N.E.2d 74, 79 (Ill. 1954).

Moreover, the proximate cause must produce the injury through a natural and continuous sequence of events that is unbroken by any effective intervening cause. *See Ungar v. Eichleay Corp.*, 614 N.E.2d 1241, 1245 (Ill. App. Ct.1993). If the defendant's negligence simply furnished a "condition by which the injury is made possible and that condition causes an injury by the subsequent, independent act of a third person, the creation of the condition is not the proximate cause of the injury where the subsequent act is an intervening efficient cause which breaks the causal connection between the original wrong and the injury, and itself becomes the proximate or immediate cause." *Merlo v. Public Serv. Co. of Northern Illinois*, 45 N.E.2d 665, 675 (Ill. 1942). In other words, "[t]he cause of an injury is that which actually produces it, while the occasion is that which provides an opportunity for the causal agencies to act." *Id.*

The intervention of an independent cause, however, does not guarantee that the defendant will be relieved of liability for its negligence. *See Lindenmier v. City of Rockford*, 508 N.E.2d 1201, 1211 (Ill. App. Ct. 1987). If the intervening cause could have been reasonably anticipated, the connection is not disturbed. *See id.* The causal connection between the

defendant's negligence and the injury is broken only "if the intervening acts or omissions of a third party are improbable or unforeseeable, and, thus, superseding." *Medina v. Air-Mite Devices, Inc.*, 515 N.E.2d 770, 773 (Ill. App. Ct. 1987). *See also* Restatement (Second) of Torts § 447 cmt. g. (1965) ("the negligence of the act may be so great or the third person's conduct so reckless as to make it appear an extraordinary response to the situation created by the actor and therefore a superseding cause of the other's harm").

Here, the Navy contends that Cuyler has not proven by a preponderance of the evidence that the Navy's failure to report the suspected abuse of the Norman Child at the hands of Higgins proximately caused the death of the Decedent. Specifically, the Navy contends that the abuse was an independent intervening cause and therefore: (1) even if the abuse had been reported to DCFS and the FAP, Ms. Higgins would still have abused the Decedent;[4] and (2) it was not reasonably foreseeable that the failure to report the abuse would lead to the death of the Decedent.

While Illinois courts have not addressed these contentions, other jurisdictions have addressed whether medical personnel who fail to report suspected child abuse under a state reporting statute proximately caused the subsequent abuse and/or death of a child. For example, in *Stecker v. First Commercial Trust Co.*, 962 S.W.2d 792, 793 (Ark. 1998), the estate of a child sued a doctor for negligence for

[4] As explained above, this contention appears to ignore the fact that Illinois courts generally apply the "substantial factor test" not the "but for rule" in determining proximate cause. Under the substantial factor test, the plaintiff does not need to show that the defendant's actions were completely the cause of the injury, only a "substantial factor."

failing to report evidence of child abuse by a stepmother to the proper authorities, as required by the Arkansas reporting statute. After the jury returned a verdict for the plaintiff, the doctor appealed on the grounds that there was insufficient evidence to support a finding that the failure to report the abuse proximately caused the child's death. *Id.* Affirming the verdict, the Arkansas Supreme Court held that a finding of proximate cause was supported by the testimony of two expert witnesses. *Id.* at 796-97. One expert testified that if the abuse was reported, she "would expect the abuser to back off under the bright light of an investigation," and therefore, filing a report "could have saved the child's life by exposing the abuser." *Id.* Another expert testified if the report was properly filed, social services would have informed the child's father and "everyone else associated with [the] child." *Id.* at 796.

Additionally, in *Marcelletri v. Bathani*, 500 S.W.2d 124, 126 (Mich. Ct. App. 1993), a child, who was abused by his baby-sitter, sued a doctor for negligence for failing to report evidence of child abuse by the baby-sitter of another child prior to the abuse of the plaintiff. Affirming summary judgment in favor of the doctor, the court held that the child failed to establish sufficient facts to show that the child's injuries could have been avoided if the doctor had reported the abuse of the other child to the proper authorities, as required under the Michigan reporting statute. *Id.* at 128-29. In making this determination, the court noted that if the abuse was reported, only persons associated with the other child would have been alerted, not the parents of the plaintiff, and therefore, the report would not have "protected" the plaintiff from the babysitter. *Id.*

Similarly, in *Boland v. State of New York*, 693 N.Y.S.2d 748, 749 (N.Y.App.Div. 1999), the father of a child who died of abuse at the hands of his stepmother, brought an action against the state for negligence for not properly processing a report of abuse of the son. The state corrected the mistake two days after the abuse was reported. *Id.* Unfortunately, by that time, the child had been murdered by his stepmother. *Id.* Affirming judgment in favor of the state, the court held that the plaintiff failed to establish by a preponderance of the evidence that the state's negligence "was a substantial factor in precipitating [the child's] death." *Id.* at 750. In making this determination, the court relied on evidence which showed that even if the report of abuse was properly and timely processed, the investigation of the abuse would not have proceeded fast enough to prevent the death of the child, which occurred two days after the report of abuse. *Id.* at 749.

Here, as explained above, Ms. Terry and Mr. Sumski had different opinions as to whether the failure to report the abuse of the Norman Child proximately caused the death of the Decedent. Ms. Terry testified that, based on her experience working at DCFS and with the Navy and her reading of the Navy's regulations, if the Navy had filed a report, as it was required to do, "it is reasonably certain" that Ms. Higgins would not have babysat the Decedent 28 days after she abused the Norman Child. In contrast, Mr. Sumski opined that, if the abuse of the Norman Child had been reported, the DCFS could not have prevented Ms. Higgins from babysitting the Decedent.

After reviewing the credibility of the expert witnesses and the parties' exhibits, this Court finds Ms. Terry's testimony more credible than Mr. Sumski's testimony. Ms.

Terry and Mr. Sumski both agreed that, if the Navy had properly reported that abuse, the DCFS would have initiated an investigation within 24 hours. Within seven days, an investigator would have interviewed the Norman Child and his parents, Ms. Higgins, and others with information about the suspected abuse, such as the medical personnel who treated the Norman Child. Both witnesses also agree that the DCFS could have requested Ms. Higgins not to provide any future childcare until the investigation was completed.

Mr. Sumski, however, stated that such requests were not made in every case, and depended on the extent of the child's injuries and whether they were the result of neglect or abuse. Mr. Terry testified that had DCFS investigated the suspected abuse of the Norman Child, it would have requested Ms. Higgins not to babysit. She based this opinion on the fact that the Norman Child was an infant, 14 months old, who had sustained head injuries, and the DCFS considered head injuries to infants as a serious risk. Also, Ms. Terry stated that given the age of the child, it was irrelevant whether the injuries were from abuse or neglect because the DCFS considered either to pose a serious risk to infants. Therefore, this Court finds that Cuyler has shown by a preponderance of the evidence that the DCFS would have ordered Ms. Higgins to refrain from providing childcare until its investigation was completed.

The major disagreement the witnesses had was whether Ms. Higgins would have followed the request not to babysit. Ms. Terry testified that, based on her experience, Ms. Higgins would most likely have adhered to the DCFS' request and stopped providing childcare services because suspects were generally intimidated by the investigation and the "cloud of suspicion" and "fear of

further repercussions to them criminally." She also based her opinion on the fact that Ms. Higgins was the spouse of an enlisted Navy serviceman who lived in Navy subsidized housing, and therefore, was more likely to comply because she faced consequences from the Navy, such as eviction from Navy housing. This opinion was buttressed by Ms. Loisel's admission that naval housing was a "sought after commodity."

In contrast, Mr. Sumski testified that it was impossible to determine whether an individual suspect would have complied with the request not to babysit. According to Mr. Sumski, based on his experience, persons who abuse children, such as Ms. Higgins, fall within a group of people who do not perceive an investigation as a threat and therefore do not cease providing childcare services. On cross-examination, however, Mr. Sumski testified that Ms. Higgins might have followed the request not to babysit. He also admitted that his opinions did not take into account any additional pressures which could have been exerted on Ms. Higgins from the FAP or other naval agencies.

Consequently, after carefully reviewing their testimony, observing their demeanor, and considering the reasonableness of their respective testimony, this Court finds Ms. Terry more credible that Mr. Sumski. As a result, this Court thus finds that if the Navy hospital had filed a report, as it was required to do, "it is reasonably certain" that Ms. Higgins would not have babysat the Decedent 28 days after she abused the Norman Child. *See Stecker*, 562 S.W.2d at 796 (finding sufficient evidence of proximate cause where a expert testified that the abuser would likely have been afraid to babysit if the prior abuse had been properly reported). She agreed that the failure to report the suspected abuse "substantially increased the

risk of harm to [the Decedent]" because it was foreseeable that Ms. Higgins would not stop her abusive behavior. Because the chance of repeated abuse was foreseeable, Ms. Higgins' abuse was not an independent intervening cause which broke the causation requirement.

Accordingly, after carefully observing the trial and reviewing the transcript and trial exhibits, this Court finds that Cuyler has shown by a preponderance of the evidence that it is reasonably certain that the Navy's failure to report the abuse of the Norman Child was a proximate cause of the abuse and death of the Decedent. The Court thus finds that the Navy is liable for the death of the Decedent and enters judgment in favor of Plaintiff Gretchen Cuyler.

II. Damages

Cuyler seeks $4 million in damages – $3 million under the Illinois Wrongful Death Act based on the loss to her and her family for the loss of companionship, love, affection, guidance, security, comfort and services, severe emotional distress, and other pecuniary losses which are the result of the wrongful death of the [sic] her son (the Decedent) and $1 million under the Illinois Survival Act for the conscious pain and suffering Decedent suffered as a result of the abuse by Higgins.

Under Illinois law, parents of children who die as a result of the negligent conduct of others are "entitled to a rebuttable presumption of substantial pecuniary loss." *Baglin v. Cook County Hospital*, 592 N.E.2d 205, 215 (Ill. App. Ct. 1992). Here, the Navy has failed to put forth any arguments or evidence to rebut this presumption. Nevertheless, this Court finds that Cuyler has put forth substantial

evidence that Cuyler and her husband and daughter suffered greatly as a result of the death of Decedent. For example, Cuyler testified that she and her family were very close to Decedent and that they were "heartbroken" and "torn up inside" after they learned of his death and the negligent conduct surrounding the abuse. Consequently, this Court finds that an award of $3 million is reasonable given the circumstances. *See Jones v. Chicago Osteopathic Hospital*, 738 N.E.2d 542, 556 (Ill. App. Ct. 2000) (affirming $2.2 million dollar judgment for parents of son, the court held that it was not excessive given that the evidence showed the plaintiff was a "dedicated and devoted" mother to her baby son).

Similarly, this Court finds that a $1 million judgment for the conscious pain and suffering Decedent suffered as a result of the abuse by Higgins is reasonable. Dr. James Frame, an emergency room physician, testified that the Decedent's injuries included multiple skull fractures, epidural hematoma, brain damage, lacerated liver, lacerated mesentery, fractured ribs, and other multiple blunt trauma. According to Dr. Frame, it was reasonably certain that these injuries caused the Decedent to suffer severe conscious pain and suffering both during the abuse and between the time the injuries were inflicted and when he died a week later as a result of his injuries.

Accordingly, this Court enters a judgment for Cuyler in the amount of $4 million.

CONCLUSION

For the foregoing reasons, the Court finds that the Navy is liable for the death of the Decedent and enters

judgment in favor of Plaintiff Gretchen Cuyler in the amount of $4 million.

ENTER: /s/ Blanche M. Manning
BLANCHE M. MANNING
U.S. DISTRICT COURT JUDGE

DATE: 3-4-03

United States Court of Appeals
For the Seventh Circuit
Chicago, Illinois 60604

June 23, 2004

Before

Hon. William J. Bauer, *Circuit Judge*

Hon. Richard A. Pesner, *Circuit Judge*

Hon. Michael S. Kanne, *Circuit Judge*

No. 03-2298

GRETCHEN D. CUYLER,
Special Administrator of the
Estate of Christian Cuyler,
deceased,
Plaintiff-Appellee,

v.

UNITED STATES OF AMERICA,
Defendant-Appellant.

Appeal from the
United States District
Court for the Northern
District of Illinois,
Eastern Division.

No. 98 C 3786

Blanche M. Manning,
Judge.

ORDER

On June 1, 2004 plaintiff-appellee filed a petition for rehearing and petition for rehearing *en banc*. All the judges on the original panel have voted to deny the petition, and none of the active judges has requested a vote on the petition for rehearing *en banc*. The petition is therefore DENIED.

2004 WL 1925419

NOTICE: THIS OPINION HAS NOT BEEN RELEASED FOR PUBLICATION IN THE PERMANENT LAW REPORTS. UNTIL RELEASED, IT IS SUBJECT TO REVISION OR WITHDRAWAL.

Appellate Court of Illinois,
Third District.

John DOE 1, by his Mother and Next Friend,
TANYA S.; Jane Doe 2, by her Next Friend,
Kristi P.; John Doe 2, by his next Friend Susan G.;
and John Doe 3, by his Mother and Next Friend,
Sharlotte S., Plaintiffs-Appellants,
v.
NORTH CENTRAL BEHAVIORAL HEALTH
SYSTEMS, INC., Defendant-Appellee,
and
(Kathy H.; Kenneth H.; and David H.,
a minor, Defendants).

No. 3-03-0317.

Aug. 26, 2004.

Appeal from the Circuit Court for the 13th Judicial Circuit, LaSalle County, Illinois. No. 01-L-85 consolidated with 01-L-222. Honorable William R. Banich, Judge, Presiding.

Justice *McDADE* delivered the opinion of the court:

In this consolidated case from the circuit court of LaSalle County, the plaintiffs appeal from the dismissal, pursuant to Section 2-615 of the Code of Civil Procedure (735 ILCS 5/2-615 (West 2002)), of all claims against the defendant North Central Behavioral Health Systems, Inc.

The plaintiffs are four children who were sexually abused by David H., also a minor. The parents of the

abused children brought suit against David H. and his parents, Kathy and Kenneth H., as well as against North Central Behavioral Health Systems (the Clinic), a psychological clinic that saw David as a patient. With respect to the Clinic, the suit alleged that while he was a patient at the clinic, David H. told his therapist that he was sexually abusing children in his apartment complex and that the Clinic failed to report the abuse to the Illinois Department of Children and Family Services (DCFS). The plaintiffs claimed that the Clinic owed a duty of care to the abused children under the reporting provision of the Abused and Neglected Child Reporting Act (Reporting Act or Act) (325 ILCS 5/4 (West 2002)), which required it to inform the State of the abuse and to take steps to see that the abuse was stopped. The plaintiffs also asserted in the alternative that the Clinic owed a common law duty to the abused children and that it was negligent in not reporting or attempting to stop the abuse.

In its motion to dismiss, the Clinic asserted that the Reporting Act does not impose a duty to report the abuse of children with whom the Clinic has no direct contact or professional relationship. The Clinic also argued that no common law duty to protect could be imposed on the Clinic. The court granted the motion and dismissed the claims against the Clinic with prejudice. Because we agree that no cause of action lies against the Clinic, we affirm.

ANALYSIS

The plaintiffs argue on appeal that the trial court erred in dismissing all claims for damages under both the Reporting Act and the common law. The defendant asserts that the Act does not authorize a private cause of action

and the claim must be dismissed, and also, asserts that it does not owe any common law duty to the abused children. The dismissal of the plaintiffs' claims under section 2-615 for failure to state a cause of action is reviewed *de novo*. *Bea v. Bethany Home, Inc.*, 333 Ill.App.3d 410, 413, 775 N.E.2d 621, 623 (2002). In reviewing the complaint, the court must accept all well pleaded facts as true, the pleadings are to be liberally construed with a view to doing substantial justice between the parties, and the allegations of the complaint should be liberally construed in favor of the plaintiffs. *Bea*, 333 Ill.App.3d at 413, 775 N.E.2d at 623.

I. Reporting Act

A. Private Right of Action

The Reporting Act does not expressly provide for a private cause of action in the event of a violation. The plaintiffs assert, however, that the case of *Doe v. Dimovski*, 336 Ill.App.3d 292, 783 N.E.2d 193 (2003), supports the argument that a private action may be maintained. In that case, a student and parent sued the school district that employed a teacher who had sexually abused the student. The plaintiffs sued on a negligence theory, claiming that the school district had a duty to investigate the abuse and report it to the DCFS. The case did not directly address whether a private cause of action may be maintained under the Act. The court found that the plaintiff's claim could not be dismissed on the basis of section 2-201 of the Local Governmental and Governmental Employees Tort Immunity Act (745 ILCS 10/2-201 (West 2000)), since the Reporting Act did not allow the school district discretion in deciding whether to report suspected child abuse. *Dimovski*, 336 Ill.App.3d at 297, 783 N.E.2d at 198. The fact

that the case does not address the issue contested here, whether there exists a private right of action, limits its precedential value.

The law is clear regarding a private cause of action arising from a statute that does not explicitly provide one. A statute implies a private cause of action if: (1) the plaintiff is a member of the class for whose benefit the statute was enacted; (2) the plaintiff's injuries are those the statute was designed to prevent; (3) a private cause of action is consistent with the underlying purpose of the statute; and (4) implying a private cause of action is necessary to provide an adequate remedy for violations of the statute. *Fisher v. Lexington Health Care, Inc.,* 188 Ill.2d 455, 460, 722 N.E.2d 1115, 1117-18 (1999).

In a general sense, the plaintiffs are members of the class for whose benefit the Reporting Act was enacted. The statute has as one of its purposes the protection of abused children. *Bea,* 333 Ill.App.3d at 414, 775 N.E.2d at 624. Similarly, the injuries sustained by the plaintiffs, a result of sexual abuse, are the kind the statute was designed to prevent. 325 ILCS 5/2 (West 2002). However, as discussed below in Part I.B., the children do not fall within the somewhat limited definition of "abused children" contained in the statute.

It is not as clear whether a private remedy is consistent with the underlying purpose of the statute as a whole. The Act is designed to enhance the ability of the DCFS to "protect the health, safety, and best interests of the child in all situations in which the child is vulnerable to child abuse or neglect." 325 ILCS 5/2 (West 2002). Nowhere is it either explicitly stated or implied that a purpose of the Reporting Act is to provide children or families with

compensation for sexual abuse or a failure to report abuse. The plaintiffs argue that the finding of an implied private cause of action for a failure to report would lead to enhanced enforcement of the Act. The same argument could be made of almost any statute. What the plaintiff fails to present is any evidence that the statute does not already adequately serve its purpose, absent a private cause of action. It may be said that a private cause of action is not *inconsistent* with the purpose of the Act, since it may provide extra incentive for compliance, but as discussed below, the statute already includes an adequate mechanism for enforcement.

Finally, an implied private cause of action is not necessary to provide an adequate remedy for violations of the statute. A cause of action should only be implied in a statute "in cases where the statute would be ineffective, as a practical matter, unless such an action were implied." *Fisher,* 188 Ill.2d at 464, 722 N.E.2d at 1119-20. The Reporting Act provides criminal sanctions for failure to report. Individuals who fail to fulfill an obligation to report are guilty of a Class A misdemeanor. 325 ILCS 5/4.02 (West 2002). The plaintiffs have not explained why this sanction is insufficient to assure compliance with the provisions of the statute.

In summary, although the plaintiffs are members of the class of individuals who are to be protected by the Reporting Act, and even though the harm suffered by the children was of the type the statute was designed to prevent, the plaintiffs have not shown that a private cause of action may be implied in the statute. There is no evidence that the statute was designed to provide monetary remedies for victims of abuse or to impose civil liability on those who fail to report. Furthermore, there is nothing to

show that the statute suffers from inadequate enforcement absent a private remedy. We do not find, therefore, that a private cause of action can be maintained under the statute.

B. Failure to State a Claim

Even assuming an implied private cause of action, the plaintiffs have failed to state a claim under the Act. The Act requires that subject individuals who have "reasonable cause to believe a child known to them in their professional or official capacity may be an abused child or a neglected child shall immediately report or cause a report to be made to the [DCFS]." 325 ILCS 5/4 (West 2002). An abused child is defined by the Act as a:

> "child whose parent or immediate family member, or any person responsible for the child's welfare, or any individual residing in the same home as the child, or a paramour of the child's parent * * * (c) commits or allows to be committed any sex offense against such child, as such sex offenses are defined in the Criminal Code of 1961, as amended, and extending those definitions of sex offenses to include children under 18 years of age." 325 ILCS 5/3 (West 2002).

Initially, we note that the children in this case do not fall within the statutory definition of "abused children." There is no allegation that a parent or anyone else responsible for the children's welfare allowed the abuse to occur. This alone renders the Act inapplicable.

The defendant also argues that it did not know the children in a "professional or official capacity" and therefore it is not required to report abuse. The current statute does not define the phrase, but a prior version of the

statute provides guidance. Effective July 1, 1980, the phrase "known to them in their professional or official capacity" replaced the phrase "with whom they have direct contact" in the statute. (Pub. Act 81-1077, eff. July 1, 1980; Ill.Rev.Stat.1979, ch. 23, par.2054). The historical and statutory notes are silent on the motivation for the change, but at the very least it can be said that the defendant here would have had no duty to report under the statute prior to the amendment. The change can be read in one of two ways: one that limits the scope of the Act and one that expands it.

The expanding interpretation would hold that the statute no longer requires "direct contact" between those required to report and a child who is subject to abuse or neglect. Under this interpretation, the defendants may have had a duty to report in this case, depending on the level of contact that is ultimately found to be necessary. For example, if a therapist sees a parent as a patient and the parent admits to sexual abuse, does the therapist have a duty to report? Is the child known to the therapist in a professional or official capacity? Since the therapist would have found out about the abuse through her official capacity in treating the parent, the answer is most likely yes. In a similar vein, the therapists in this case came to know of the abuse in their official capacity. Therefore it would be reasonable to find that they had a duty to report the abuse.

The limiting interpretation would find that "direct contact" is still required, but that the contact must arise in the context of the defendant's professional or official capacity. Those subject to the Act would have no duty to report abuse of children with whom they have had no direct contact, or children with whom they have had

contact in a nonprofessional setting. The amendment would place those subject to the Act on par, in a nonprofessional setting, with all other individuals, who "may make a report" if they have direct contact with an abused child. (325 ILCS 5/4 West 2002). The individuals subject to the Act, due to the fields in which they work, are in a position to learn of child abuse and should be required to report it when it is discovered in the scope of employment. It does not follow, however, that they should be subject to a higher standard than the rest of the population when not acting in a professional capacity. Under this interpretation, the defendants would have no duty to report, since they did not have direct contact with the abused children.

Although both interpretations appear reasonable, there is no indication that the legislature intended to expand the duty imposed by the Act significantly beyond that imposed by the prior version. Therefore, the limiting interpretation is, we believe, the correct one. Under that interpretation, the defendants have no duty under the circumstances in this case.

II. Common Law Negligence

The plaintiffs also argue that the court improperly dismissed their common law negligence claim against the Clinic. They assert that the Clinic had a duty to warn that the victims were at risk of sexual abuse by David H. Since the children already knew that they were being actively abused, we assume for this analysis plaintiffs are asserting a duty to warn or advise the parents.

To sustain a cause of action predicated on a therapist's alleged duty to warn third parties of the potential violent acts of a patient, the plaintiff must demonstrate the

following: (1) the patient made specific threats of violence, (2) the threats of violence were directed against a specific and readily identifiable victim, and (3) there is a direct physician-patient relationship between the defendant and the victim or a special relationship between the patient and the victim. *Eckhardt v. Kirts,* 179 Ill.App.3d 863, 872, 534 N.E.2d 1339, 1344 (1989), citing *Kirk v. Michael Reese Hospital,* 171 Ill.2d 507, 531, 513 N.E.2d 387, 399 (1987).

The present case does not meet the *Eckhardt* standard. Although David made specific threats of violence, and the violence was directed against a readily identifiable set of victims, there was no direct physician-patient relationship between the Clinic and the victims, nor was there a special relationship between David and the victims. Under the *Eckhardt* analysis, the Clinic owed no common law duty to the victims in this case.

CONCLUSION

The plaintiffs have not alleged a cause of action either under the Reporting Act or for common law negligence. The Reporting Act does not provide a private cause of action. However, even if it did, the defendants, by the plain text of the Act, did not commit a violation. Also, the plaintiffs cannot show a claim for common law negligence because of the absence of a special relationship between David and the victims or a patient-physician relationship between the victims and the Clinic. The order of the circuit court of LaSalle County is affirmed.

Affirmed.

SLATER, J., concurs.

HOLDRIDGE, P.J., specially concurs.

Presiding Justice HOLDRIDGE, specially concurring:

I concur in the majority's opinion but write separately to clarify my view regarding the plaintiffs' common law claim. In *Novak v. Rathnam,* 153 Ill.App.3d 408, 411 (1987), this court expressed its belief "that Illinois would adopt *Tarasoff's* affirmative duty on therapists to warn foreseeable third parties" (referring to the landmark case of *Tarasoff v. Regents of University of California,* 551 P.2d 334 (1976)). I agree with the standard articulated in *Tarasoff* (which would warrant a reversal in the instant case); however, the Illinois Supreme Court has declined to adopt it:

> "We consider that the preferable view, and the one consistent with this court's holdings and with legislation based on social and public policy, is that a plaintiff cannot maintain a medical malpractice action absent a direct physician-patient relationship between the doctor and plaintiff or a special relationship * * * between the patient and the plaintiff." *Kirk v. Michael Reese Hospital and Medical Center,* 117 Ill.2d 507, 531 (1987).

As the majority has observed, these requirements are not met under the instant facts. An example of the requisite "special relationship" is found in *Renslow v. Mennonite Hospital,* 67 Ill.2d 348 (1977), where a duty was owed to an unborn child who allegedly suffered injuries from negligent treatment of the child's mother. Unlike a child and its mother, the instant plaintiffs are not "intimately related" to the patient (David H.). See *Kirk,* 117 Ill.2d at 528.

Since we are bound by precedent from our Supreme Court, I concur in the majority's decision to affirm the trial court's judgment.